(6)

No. 03-9627

In The Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX
VOLUME II, PAGES 293 to 540

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Petition For Certiorari Filed March 4, 2004
Certiorari Granted September 28, 2004

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[SEAL]

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LYNNE ABRAHAM
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May 6, 1998

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street, Suite 315
Philadelphia, Pennsylvania 19106

Re: LETTER BRIEF
Commonwealth v. John Pace
No. 3642 Philadelphia 1997

Dear Mr. Szewczak:

On February 13, 1986, defendant pled guilty to second degree murder and possessing an instrument of crime (Nos. 1272, 1275, October Term, 1985) before the Honorable David N. Savitt. Judge Savitt sentenced defendant to life imprisonment for the murder and a concurrent term of one to two years for possessing an instrument of crime. Content with his guilty plea, defendant did not move to withdraw the plea, modify the sentence, or appeal.

On August 21, 1986, however, defendant had a change of heart and filed a *pro se* petition for relief under the Post Conviction Hearing Act (PCHA). With the aid of appointed counsel, defendant filed an amended petition. Following a hearing on the Commonwealth's motion to dismiss but before a decision was rendered, counsel withdrew and new counsel was appointed to represent defendant. A second amended PCHA petition was filed, alleging trial counsel's

ineffectiveness. On July 23, 1991, the post-conviction court, the Honorable James D. McCrudden, dismissed defendant's petition.

Defendant appealed to this Court, which affirmed the denial of post-conviction relief on March 30, 1992. *See Commonwealth v. John Pace,* No. 2429 Philadelphia 1991 (Pa.Super. filed March 30, 1992). Defendant then filed a petition for allowance of appeal, which was denied by the Pennsylvania Supreme Court on September 2, 1992.

On November 27, 1996, over ten years after his judgment of sentence became final, defendant filed his second petition for state post-conviction relief, under the Post Conviction Relief Act (PCRA). Judge Savitt dismissed the petition on July 23, 1997. This *pro se* appeal followed. No relief is due.

BECAUSE DEFENDANT'S SERIAL PCRA PETITION WAS UNTIMELY, THE COURT BELOW LACKED JURISDICTION TO ENTERTAIN IT, AND, AS A RESULT, NO CLAIM EXISTS FOR THIS COURT TO REVIEW.

Defendant's second petition was indisputably untimely. In *Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa.Super. 1997), this Court noted that in 1995, the General Assembly modified the PCRA to, *inter alia*, specify time limits for the litigation of PCRA petitions. The 1995 PCRA amendments required that, in all cases except those fitting narrowly tailored exceptions, a PCRA petition must be filed within one year of the date that the defendant's judgment became final. Specifically, the amendments, applicable to petitions filed after January 16, 1996, bar any petition for post-conviction relief, "*including* a *second or subsequent petition*," not filed "within one year of the

date the judgment becomes final." 42 Pa.C.S.A. §9545(b)(1) (emphasis added).[1] "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S.A. §9545(b)(3). This provision assures the prompt resolution of collateral claims before files and crucial documents are lost, before memories have dispersed, and, where meritorious claims are presented, before a lengthy period of improper incarceration has passed.

Here, defendant did not appeal his judgments of sentence. Therefore, defendant's judgment became final on March 13, 1986, thirty days after sentencing. The instant collateral petition, defendant's second, was not filed until November 27, 1996, over ten years after his conviction became final. The petition, thus, was time-barred.

Section 9545 clearly and unambiguously demonstrates that defendant's second post-conviction petition is time-barred and, thus, the lower court lacked jurisdiction even to entertain it. *See Commonwealth v. Alcorn, supra.* When the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain and obvious meaning. *E.g., Commonwealth v. Corporan,* 531 Pa. 348, 351, 613 A.2d 530, 531 (1992).

---

[1] The Pennsylvania Supreme Court's recent grant of an additional one year grace period in which to file a *first* PCRA under the 1995 amendments, *see* Pa.R.Crim.P. 1501 (Comment), is not applicable to the instant matter. As defendant is currently appealing the dismissal of his *second* post-conviction petition, he is not entitled to the benefit of this grace period. *See Alcorn, supra,* 703 A.2d at 1057.

Although the 1995 PCRA amendments provided exceptions to the one year deadline for filing a PCRA petition, defendant's petition alleged nothing that would trigger any of them. These exceptions excuse a petitioner's failure to file a PCRA petition within a year of the date his judgment becomes final if the petitioner proves that (1) "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;" or (2) "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;" or (3) "the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." *See* 42 Pa.C.S.A. §9545(b)(1)(i)-(iii).

Defendant's PCRA petition did not claim that *any* of these exceptions applied. And, indeed, a review of the petition, and defendant's appellate brief, conclusively establishes that no exception applies. Defendant raises three complaints in his appellate brief, alleging that his sentence of life imprisonment for second degree murder – which was *mandated* by statute – somehow is invalid unless a minimum term allowing for parole eligibility is written into it. Defendant further complains that the guilty plea colloquy failed to ensure that he understood the consequences of his plea. (It should be noted that this complaint was raised, and rejected by this Court, in defendant's 1991 appeal. *See Commonwealth v. John Pace,* No. 2429 Philadelphia 1991 (Pa.Super. filed March 30, 1992).) Defendant's final complaint is a blanket accusation

of ineffectiveness against all prior counsel. These types of complaints do not present the extraordinary circumstances contemplated by the §9545 exceptions. The basis for these complaints – if any – have all existed ever since defendant's trial. Government officials did not prevent defendant from raising his claims in a timely manner; the instant petition is not based on facts that were unknown and unavailable to defendant; and defendant has not asserted a new constitutional right that either the Pennsylvania Supreme Court or the United States Supreme Court has held apply retroactively. Accordingly, defendant's PCRA petition was and is time-barred. And, since it is time-barred, the lower court had no power to grant relief, and he can raise no cognizable complaint on appeal.

As this Court specifically recognized in *Alcorn, supra,* section 9545's time restrictions have a jurisdictional consequence. The trial court had no jurisdiction over defendant's judgments of sentence once thirty days passed. 42 Pa.C.S.A. §5505. Thereafter, a court's jurisdiction to entertain a subsequent collateral attack depends entirely upon what the legislature authorizes. "Post conviction relief is afforded petitioners in Pennsylvania through the grace of the legislature." *Alcorn, supra*, 703 A.2d at 1057. Here, the legislature has conferred post-conviction jurisdiction upon the courts, but constrained that jurisdiction by both time requirements and substantive requirements. And, unless the petitioner files a timely petition, or he pleads and proves at least one of the three exceptions, the court has no authority to entertain the petition. *Id.* Because the PCRA court had no jurisdiction to grant defendant relief, there is no claim for this Court to review. *Id.*

This Court and the Commonwealth should not have to review the record here and respond to claims which are

not available to defendant under the Act he invokes. *Id.* at 1056 ("We need not address any of appellant's issues because the PCRA court lacked jurisdiction to hear appellant's PCRA petition"). Defendant, who already has had his conviction reviewed, is not entitled to endless levels of additional review. The General Assembly has modified the PCRA so that individuals, like defendant, may no longer burden the court system with an endless influx of repetitive petitions. To even reach the "merits" of defendant's petition would constitute a clear defiance of the legislature's intent and allow defendant a privilege which this Court has explicitly recognized he has no entitlement to. *Id.* at 1057.[2]

Accordingly, defendant's appeal from the denial of his time-barred PCRA petition should be quashed. At a minimum, the order denying defendant's petition must be affirmed.

Respectfully submitted,

/s/ Michael A. Morse
MICHAEL A. MORSE
Assistant District Attorney

/s/ Peter J. Gardner
PETER J. GARDNER
Assistant Chief, Appeals Unit

cc: Honorable David N. Savitt
John A. Pace, *pro se*

[2] Should this panel chose to reach the "merits" of defendant's arguments, notwithstanding *Alcorn* and the PCRA, the Commonwealth respectfully requests the opportunity to address the merits of defendant's claims.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S REPLY BRIEF

(Filed May 28, 1998)

Appeal from the Order of The Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trial Division which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY-6445
P.O. Box 244
Graterford, Pennsylvania

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Rule 2113 and 2185

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to *Pa.R.A.P. 2113 and 2185(a).*

APPELLANT IS ENTITLED TO POST CONVICTION RELIEF, DESPITE THE COMMONWEALTH'S OBJECTION TO THE CONTRARY, AND THIS COURT SHOULD ENTERTAIN THIS PETITION, AS CLAIMS FOR RELIEF DO EXIST.

On August 21, 1996, appellant filed a his first *Post Conviction Hearing Act* Petition challenging the voluntariness of his guilty plea, which occurred on February 13, 1996, six months prior. The disposition of this appeal ended with a denial of an allowance of appeal by the Pennsylvania Supreme Court on September 2, 1992, which was *over six years* after this petition was filed. On November 27, 1996, appellant filed his second Post Conviction Relief Act Petition (PCRA), which was four years after the Pennsylvania Supreme Court denied his first *PCHA* petition for an allowance of appeal. It is clear that this appellant has not abused the *PCRA* process. The appellant filed this second *PCRA* petition out of necessity, and in hopes of receiving some measure of justice. Appellant raised three issues in this *PCRA* petition to be reviewed.

"Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson – murder are *illegal;*" "Guilty plea *colloquy that failed to ensure that Petitioner understood the consequences of his plea,* compels a withdrawal of his plea," and "Ineffective assistance at all levels of representation, resulted in a denial of due process and a miscarriage of justice." It was this Court that held that a conviction cannot stand upon a constitutional error that affected the verdict. *See: Commonwealth v. Stark,* 442 Pa. Super. 127, 658 A.2d 816 (1995) (Post Conviction review by an appellate court is limited to determining whether a trial court's findings are supported by the record and whether its order is otherwise free of legal error).

Nevertheless, the Commonwealth argues that appellant is not entitled to any relief, and does not have access to this Court because of the recent decision in *Commonwealth v. Alcorn,* 703 A.2d 1054 (Pa.Super.1997). In *Alcorn,* this Court noted that in 1995, the General Assembly made modifications to the PCRA to indicate time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence became final. The only exception being those cases that can meet the enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A. §9545(b)(1)(i)(ii)(iii). Therefore, because appellant judgment of sentence was final March 13, 1986, thirty days after his guilty plea and sentencing and over ten years now, the Commonwealth asks that his PCRA petition be quashed.

When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because this Court had not decided on that case yet. But, *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989), and *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988) was the law, and is still the law. *Blackwell/Lawson* are judicial exceptions to the waiver doctrine of the old PCRA legislation, and certainly should be retained as a judicial exception under the new PCRA legislation. The *Blackwell/Lawson* standards of review for second and subsequent PCRA petitions serves as a valuable relief mechanism and safeguard to check situations such as the present, and these decisions have not been overruled by either the Pennsylvania Supreme Court or this Court. As well, *Alcorn,* supra. has not overruled these decisions, nor is it retroactive. So the Commonwealth's reliance on this decision is misplaced. It may be assumed that these decisions are no longer valid because they have been overruled by the legislature's enactment of the new PCRA legislation. But if this is true, it creates problems on its own; such as, a violation of separation of powers encroachment on the judiciary and things of this sort. So even though the legislature did not expressly state that *Blackwell/Lawson* was overruled, they made certain that, that would be the result by stating in the text of the statute, "Any petition, including a second or subsequent petition, shall be filed within one year of the date the judgement becomes final." This "back-door" encroaching should be recognized by this Court and should be checked. The legislature is not permitted to overrule judicial decisions theoretically, expressly or otherwise, because that is the role of judiciary. Appellant urges this Court to exercise its judicial wisdom in upholding *Blachwell/Lawson,* supra. standards of review for second and subsequent

PCRA petitions as a *Judicial exception* to the time bar. Appellant believes that the issues presented in the instant case, demonstrates a miscarriage of justice that entitles him to PCRA review. Appellant ask that this Court review his PCRA petition under the *Blackwell/lawson* standard and remand his case back to the lower courts for further review; or in the alternative, order a new trial based on the allegations raised herein. It is clear that the honorable Thomas Saylor of this Court felt that *Blackwell* and *Lawson* would still be applicable to future PCRA petitions under the 1995 amendments when he stated: ***Subsequent Petitions***

> Subsequent and successive petitions are subject to the same deadlines applicable to an initial petition. § 9545(b)(1). In addition, such petitions will not be reviewed unless the petitioner makes a strong prima facie showing that a miscarriage of justice may have occurred (Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988). *See:* (Pennsylvania Law Weekly) Monday, June 30, 1997. ***Post Conviction Relief in Pennsylvania.***

If this position taken by the Commonwealth is upheld, it would demonstrate a clear breakdown of the adversarial process, as well as a miscarriage of justice. Despite the existence of constitutional errors that remain unresolved in the instant case; errors that no question contributed to the verdict in such a way, that it undermined the truth – determining process that no reliable adjudication of innocence or guilt has taken place, the Commonwealth urges this Court to disregard all of that and quash appellant's appeal.

Again, the Commonwealth relies on the retroactive application of the amendments to the PCRA by the General Assembly 42 Pa. C.S.A. §9545(b)(1) which states:

> "(b) Time for filing petition.
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgement becomes final, unless the petition alleges and the petitioner proves that:

Based on this section and the opinion rendered in *Commonwealth v. Alcorn,* supra., the Commonwealth's contention is that appellant is time barred from filing his second PCRA petition, and this Court does not have jurisdiction to entertain this appeal. This new amendment to the PCRA process is a servere instance of retroactivity that deprives appellant of Procedural and Substantive Due Process, as well as access to the Courts under the 14th. Amendment to the United States Constitution. Appellant's second PCRA petition was filed in November 1996, over ten years after the final judgment was rendered in his case. Appellant challenges the PCRA's one year statute of limitation to petitions arising from judgment that became final *prior to the effective date of the PCRA.* Prior to the passage of the new PCRA legislation, a petitioner had the right to file a petition at any time after a conviction became final. The Pennsyvania Superior Court and the Pennsylvania Supreme Court has held in previous decisions that the delay in filing a PCRA petition, standing alone, was not a sufficient reason to deny the petition, but that the delay may be considered as a factor in assessing the petition's merit. *Commonwealth v. Johnson,* 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. McCabe,* 359

Pa. Super. 566, 519 A.2d 497 (1986). The Pennsylvania General Assembly has decided to take on the role of Judiciary and decide that, delay by itself, can result in the dismissal of an individual's PCRA petition. §9545(b)(1), supra. Thus, an individual whose conviction becomes final on or after January 16, 1996 have one year in which to file a PCRA petition unless he/she meets one of the other enumerated exceptions which follows:

> "(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in vioaltion of the Constitution or laws of this Commonwealth or the Constitution or laws of the Uni'ed States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a Constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that Court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented."

Id. §9545(b)(1)(i)(ii)(iii)(2). Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the

legislature stripped appellant's rights and fair expectations as of February 13, 1986. This is completely unfair. The rights appellant had, that is, to file a PCRA petition at anytime after his conviction, was vested rights, and clearly, legislation such as the one at issue, cannot retroactively bar a petitioner from his/her ability to have a court consider the propriety of a PCRA petition without first having a reasonable time to bring the claim. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others who are similarly situated, due process of law, as well as access to courts. In *Miller v. Florida,* 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed. 2d. 351 (1987), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition. In this sense, ex post facto violations could be implicated. Applying the PCRA retroactively to strip completely the right of prisoners, such as appellant, to petition for PCRA relief, would be entirely unfair and a severe instance of retroactivity. The U.S. Supreme Court has held that new legislation shortening a statute of limitations must also allow pre-existing claimants a reasonable time in which to file their claims:

> "[I]t may be properly conceded that all statutes of limitation must proceed on the idea that the

party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; *if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily,* whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . ."

Texaco v. Short, 454 U.S. 516, 527 n.21, 102 S.Ct. 781, 791, n21 (1982), (Quoting *Wilson v. Iseminger,* 185 U.S. 55, 22 S.Ct. 573 (1902). The Due Process Clause, is the forerunner in protecting the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant retroactive application. The Due Process Clause has the ability to check the legislature's unmatched powers that allow it to sweep away settled expectations suddenly and without individualized consideration.

So again, the Commonwealth reliance on *Commonwealth v. Alcorn,* supra. is misplaced. The Commonwealth argues that appellant has not established any claim that is recognizable by the limited exceptions to the time bar. Appellant believe and avers that he is also entitled to relief under §9545(b)(1)(ii) supra. Appellant who was seventeen years old when he entered his guilty plea on March 13, 1986 and has no prior experience with the judiciary system, was an unskilled layman, completely ignorant of the law. Immediately once he learned that the information provided to him by trial counsel was false, he filed a PCHA petition on August 21, 1986. Furthermore,

appellant believes that the issue at bar, concerns a question of waiver, not a question of jurisdiction as the Commonwealth argues. Since appellant could not, and still cannot allege PCRA counsel(s) ineffectiveness for their combined failure to provide adequate assistance on the prior collateral matter; their actions went unchecked, and could have only been challenged by appellant filing subsequent PCRA petition. *See: Commonwealth v. Beasley,* 678 A.2d 773 (1996). The Pennsylvania Supreme Court held in *Commonwealth v. Christy,* 540 Pa. 192, 656 A2d. 877 (1995), that an allegation that prior counsel was ineffective for failing to raise an issue *will* overcome the waiver provision of the PCRA *as long as appellant had a constitutional right to counsel at the stage in the proceedings where counsel's ineffective resulted the waiver.* All the issues that appellant is raising are trial related. Appellant challenges the illegality of his sentence, which is an issue never waived. Appellant challenges the guilty plea colloquy that is defective, because it fails to inform the appellant that he would be ineligible for parole by pleading guilty. This issue has never been raised and the record will reflect it. Lastly, appellant raises the issue of ineffective assistance of all counsels. This is not a blanket accusation of ineffectiveness against all prior counsels. Appellant support is PCRA counsel Rudenstein's letter (see exhibit D), where trial counsel omits to him that she did not inform appellant of the consequences of his plea. So clearly PCRA counsel should have subpoena her to testify on March 26, 1991, to explain exactly what she did tell appellant. He had enough evidences to support appellant's claim, and the record does not refute appellant's contention that he was told that he would be released after serving 10 to 15 years and that it's not the end of his life. PCRA inaction in this regard must be checked. Recently the Third Circuit Court appeal ruled

in *Meyers v. Gillis,* (Phila. Daily News April 28, 1998), that erroneous advice by trial counsel to the defendant that he will be eligible for parole to second degree murder does entitle defendant to receive a new trial.

WHEREFORE, for all the foregoing reasons, appellant respectfully request that this Honorable Court to reverse the PCRA Court's order and either Order a new trial or remand for further proceeding so that appellant can fully have these issues litigated.

Dated: March 26, 1998

Respectfully,

/s/ John A. Pace
John A. Pace, AY6645
P.O. Box 244
Graterford, PA 19426

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Philadelphia 1997
Appelle	:	No. 03642
vs.	:	
JOHN A. PACE,	:	Trial Court Docket Nos.
Appellant	:	OCTOBER TERM, 1985
	:	No. 1272, 1/1

PROOF OF SERVICE

I hereby that I am this 26th day of May serving the forgoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail Addressed as follow:

Peter J. Gardner
District Attorney Office
1421 Arch Street
Philadelphia, PA 19102
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/s/ John A. Pace
John A. Pace, AY-6445
P.O. Box 244
Graterford, PA 19426-0244

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
JOHN A. PACE,	:	
Appellant	:	No. 3642 Philadelphia 1997

Appeal from the Order dated July 23, 1997,
in the Court of Common Pleas of Philadelphia County,
Criminal, at October Term, 1985, No. 1272 1/1.

(Filed Dec. 3, 1998)

BEFORE: DEL SOLE, HUDOCK and HESTER, JJ.

MEMORANDUM:

This is an appeal from the order denying Appellant's second petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. sections 9541-46. We affirm.

On February 13, 1986, Appellant entered a plea of guilty to second-degree murder and possessing an instrument of crime (PIC).[1] He was sentenced to life imprisonment for the murder conviction and received a concurrent term of not less than one nor more than two years for the PIC conviction. Appellant did not file a motion to withdraw or reconsider the guilty plea, nor did he file a direct appeal.

Appellant filed his first petition for post-conviction relief on August 21, 1986, with the court appointing

[1] 18 Pa.C.S.A. §§ 2502 and 907, respectively.

counsel to represent him.[2] An amended petition was filed by counsel on March 31, 1987, alleging ineffectiveness of trial counsel. Subsequently, the Commonwealth filed a motion to dismiss, and after conducting a hearing, the PCHA court denied the Commonwealth's request. Thereafter, counsel withdrew his representation and new counsel was appointed by the court.

New counsel filed a second amended petition on November 29, 1989, alleging ineffectiveness of trial counsel and trial court error in misleading Appellant into believing that he would be eligible for parole even though he received a mandatory life sentence. On March 29, 1990, the Commonwealth filed a second motion to dismiss, which was held under advisement pending an evidentiary hearing on the petition for relief. On March 26, 1991, an evidentiary hearing was conducted and again the court held the matter under advisement. On July 23, 1991, the court granted the Commonwealth's motion and dismissed Appellant's petition for post-conviction relief. This Court subsequently affirmed the dismissal. ***Commonwealth v. Pace***, 612 A.2d 535 (Pa.Super. 1992) (unpublished memorandum). On September 2, 1992, the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal.

Appellant filed the current post-conviction petition, his first under the PCRA and second overall, on November 27, 1996. Counsel was appointed and subsequently filed a petition to withdraw and a "no-merit" letter pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927

[2] This first petition was filed under the Post Conviction Hearing Act (PCHA), which was superseded by the PCRA.

(1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). On July 23, 1997, the PCRA court granted counsel's petition to withdraw and dismissed Appellant's petition based upon the "no-merit" letter. This appeal followed.

The *pro se* brief submitted by Appellant claims that the PCRA court erred in granting counsel's petition to withdraw and in denying his petition for post-conviction relief. Specifically, he argues the following: the imposition of a life sentence without eligibility for parole was illegal; his guilty plea was entered involuntarily; and, that all counsel were ineffective, resulting in a miscarriage of justice. We need not address these claims because we find that the PCRA court lacked jurisdiction to hear Appellant's petition.

Because Appellant's present PCRA petition was filed on November 27, 1996, it is governed by the most recent amendments to the PCRA which were enacted on November 17, 1995, and became effective 60 days thereafter.[3] Included in the amendments was a change in the provision governing the time in which a PCRA petition had to be filed, 42 Pa.C.S.A. section 9545(b). Section 9545(b) now states:

> **(b) Time for filing petition. -**
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

[3] Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), § 1.

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented.
>
> (3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.
>
> (4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

42 Pa.C.S.A. § 9545(b).

Accordingly, Appellant had to file his current petition within one year of the date his judgment of sentence became final. According to section 9545(b)(3), Appellant's judgment of sentence became final at the conclusion of direct review. Because Appellant did not file an appeal with this Court, his judgment of sentence became final at the expiration of the time period for seeking such review, thirty days after judgment of sentence, or March 14, 1986. ***See*** Pa.R.A.P. 903(a) (notice of appeals must be filed within 30 days). Therefore, Appellant's judgment of sentence became final more than ten years before he filed the current PCRA petition.

Moreover, Appellant's petition does not come within the proviso of the note following section 9545(b), which states that a petitioner whose judgment has become final on or before the effective date of the amendments shall be deemed to have filed a timely petition if his first petition is filed within one year of the effective date of the amendments. ***Commonwealth v. Alcorn***, 703 A.2d 1054, 1057 (Pa. Super. 1997), *appeal denied,* 1998 Pa. Lexis 1162 (Pa. June 8, 1998). If the present petition had been Appellant's first, it would be timely, as it was filed within one year of the effective date of the amendments; however, the current petition is Appellant's second, thus it was required to be filed within one year of the judgment of sentence becoming final. ***Id.*** Consequently, because Appellant's PCRA petition was not filed within one year of his judgment of sentence becoming final, it will be untimely unless one of the exceptions of section 9545(b)(1) applies. ***Id.***

Accordingly, we have reviewed the exceptions under section 9545(b)(1) and find that none is applicable. Appellant has neither alleged nor proven that his delay in raising his current claims was caused by interference by

governmental officials, thus section 9545(b)(1)(i) is inapplicable. ***Commonwealth v. Perry***, 716 A.2d 1259, 1261 (Pa. Super. 1998). In addition, Appellant has neither alleged nor proven that the claims that comprise his current PCRA petition were not known to him or could not be ascertained by the exercise of due diligence, therefore, section 9545(b)(1)(ii) is inapplicable. ***Id.*** Finally, Appellant has neither alleged nor proven that his claims consist of recently recognized constitutional rights, thus section 9545(b)(1)(iii) is inapplicable. ***Id.*** at 1261-1262. Since Appellant's PCRA petition does not fall into any of the exceptions, it is untimely. Therefore, the PCRA court lacked jurisdiction and its dismissal of the petition was proper.[4] ***Alcorn, supra,*** at 1057.

Order affirmed.

---

[4] Although the PCRA court dismissed the petition on grounds other than untimeliness, this Court may affirm a decision if it is correct on any basis. ***Commonwealth v. Petroski***, 695 A.2d 844, 847 (Pa. Super. 1997).

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appelle

vs.

JOHN A. PACE,
Appellant

Philadelphia 1997
No. 03642

APPELLANT'S APPLICATION FOR REARGUMENT

A request for allowance for reargument from the Order of The Honorable Justices: Del Sole, Hudock, and Hester filed December 3, 1998, in the Superior of Pennsylvania, affirming the Order of The Honorable David N. Savitt filed July 23, 1997, in the Court of Common Pleas, Criminal Trail Division, which denied appellant's Post Conviction Relief Petition.

John A. Pace, AY-6445
P.O. Box 244
Graterford, Pennsylvania 19426-0244

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court pursuant to *Pa.R.A.P. 2542(A).*

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	SUPERIOR COURT DOCKET
V.	:	NO. #03642PHIL97
JOHN A. PACE,	:	
APPELLANT	:	

APPLICATION FOR REARGUMENT
PURSUANT TO Pa.R.A.P 2542(A)

TO THE HONORABLE JUSTICES OF THE PENNSYLVANIA SUPERIOR COURT:

AND NOW, COMES *JOHN A. PACE,* petitioner herein who respectfully request that this Honorable Court to entertain jurisdiction under *Pa.R.A.P. 2542(A)* et. seq., and allow reargument in the above-caption matter for the following reasons:

Petitioner received a decision from the Pennsylvania Superior Court in the form of an Order on December 4, 1998, which stated in relevant part that;

> " . . . Accordingly, we have reviewed the exceptions under sections 9545(b)(1) and find that none is applicable. Appellant has neither alleged nor proven that his delay in raising his current claims was caused by interference by government officials, thus section 9545(b)(1)(i) is inapplicabe. *Commonwealth v. Perry,* 716 A.2d 1259, 1261 (Pa. Super. 1998). . . ."

Id. at page 5. While it is true that petitioner did not previously articulate the fact that his delay in filing the current PCRA petition was the result of government interference, which would satisfy *42 Pa.C.S.A. § 9545(b)(1)(i);* nevertheless, it was in fact the reason why petitioner failed to timely file his current PCRA petition. Because petitioner believed that the amended PCRA legislation was not retroactive; specifically section § *9545(b)(1),* he did not feel compelled to immediately file his current PCRA petition, especially since he was unprepared to do so. As previously stated, petitioner believes and therefore avers that, "the failure to raise the claim previously was the

result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the constitution or laws of the United States." *See: 42 Pa.C.S.A. § 9545(b)(1)(i).* Petitioner maintains that as a result of the Camphill disturbance on October 25 and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, impaired petitioner's ability to proceed with filing the current PCRA petition. To further support petitioner's argument; enclosed herewith, as *Exhibit A.,* is a partial letter which was written by petitioner to the Clerk of Courts, than Peter Truman, and the letter was date stamped Febuary 14, 1990. In the letter to the Clerk of Court, petitioner is clearly explaining to the clerk that all of his legal documents were destroyed after the disturbance at Camphill in 1989. This petitioner believes should be a sufficient reason to excuse his failure to timely file his current PCRA petition.

A second reason for this Court's consideration is that the Court has overlooked and misapprehended a fact of record material to the outcome of the case; specifically, petitioner alleged and averred that the sentence petition is now serving is illegal, and the Court completely over looked this fact without any consideration. Petitioner maintained in his original brief to this Court that the sentence was unconstitutional and illegal and therefore cannot be waived. *See: 42 Pa.C.S.A. § 9781(a); Commonwealth v. Campbell,* 351 Pa. Super. 56, 505 A.2d 262 (1986); *Commonwealth v. Walker,* 390 Pa. Super. 76, 568 A.2d. 201 (1990); and original *brief at 8.* Therefore, this Honorable Court should have addressed the question of illegality of the sentence.

WHEREFORE, Petitioner respectfully request that this Honorable Court allow reargument to proceed in the instant case.

Date: December 14, 1998

Respectfully Submitted,

/s/ John A. Pace

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:	SUPERIOR COURT DOCKET
V.	:	NO. 03642PHIL97
JOHN A. PACE,	:	
APPELLANT	:	

PROOF OF SERVICE

I hereby certify that I am this 14th day of December serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail addressed as follows:

District Attorney's Office of Philadelphia
Catherine Marshall, Appeal Unit
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5729

Dated December 14, 1998 /s/ John A. Pace
John A. Pace, pro se
P.O. Box 244, AY-6445
Graterford, PA 19426-0244

cp. 8510-1272 PLHF
Docket 4/18/90
Item 728

with the name of the Beneficiary, the most
recent one

The original

FEB 14 1990

letter was sent

to

From Wm. John Lee
Box Cpx. 445
S.C. Cot...
Graterford, Pa. ...

323

Ms. Wm. Patti Lenman
Clerk of Quarter Sessions
Room 666 City Hall
Philadelphia, Pa. 1910-

Leon Clark
Room 370 City Hall

February 7, 1990

Dear Ms. Lenman

My name is John Lee, and I am presently incarcerated in the State Correctional Institution at Camphill, Pa.

The purpose I am writing you, is to inquire of some very essential information, and I pray that you can be of assistance.

Again, as I stated to you, I am in the Institution of Camphill and as you know about the disturbance that took place here in October of 1989.

Well with all of that in mind, I would like to tell you that during the aftermath of the disturbance, all of my property was destroyed and that included my legal material. So at present I am unable with out all of my legal materials to prepare my case that is presently in the post conviction

A112

Exhibit A

BEST AVAILABLE COPY

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

January 7, 1999

David A. Szewczak, Esquire
Prothonotary
Superior Court of Pennsylvania
530 Walnut Street
Third Floor, Suite 315
Philadelphia, Pa. 19106

Re: Commonwealth v. John Pace
No. 3642 Philadelphia 1997

Dear Mr. Szewczak:

This case is before the Court pursuant to defendant's Application for Reargument of the order of Superior Court, affirming the denial of post-conviction relief.

In his application, defendant attempts to skirt the time-bar by making a new allegation that government officials interfered with his ability to raise his claims earlier. Defendant may not raise an issue in his reargument application that was not raised in his Superior Court brief. Thus, this new issue is waived. Pa.R.A.P. 302(a).

The other assertions in defendant's application are adequately addressed in the panel opinion, the lower court opinion, and the Commonwealth's original brief, upon which the Commonwealth will rely to support its position that reargument is unwarranted. A copy of the Commonwealth's brief is attached for the convenience of the Court.

For the reasons set forth, the Commonwealth respectfully requests that reconsideration be denied.

Respectfully Submitted,

/s/ Catherine Marshall
CATHERINE MARSHALL
Chief, Appeals Unit

cc: John Pace, *Pro Se*

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN A. PACE, Appellant	:	No. 3642 Philadelphia 1997

ORDER

AND NOW, this 8th, day of February, 1999, IT IS HEREBY ORDERED:

THAT the application filed December 15, 1998, requesting reargument/reconsideration of the decision dated December 3, 1998 is DENIED.

PER CURIAM

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

NO. ___ E.D. ALLOC. DKT. 1999

COMMONWEALTH OF PENNSYLVANIA

V.

JOHN A. PACE,

PETITIONER

PETITION FOR ALLOWANCE OF APPEAL

(Filed Mar. 9, 1999)

PETITION FOR ALLOWANCE OF APPEAL OF THE ORDER OF THE SUPERIOR COURT, ENTERED FEBRUARY 8, 1999 IN NO. 3642 PHILADELPHIA 1997, AFFIRMING THE ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, CRIMINAL DIVISION, ENTERED BY THE HONORABLE DAVID N. SAVITT ON JULY 23, 1997, AT CC NOS. 1272, 1275.

John A. Pace, AY-6445
P.O. Box 244
Graterford, Pennsylvania
19426-0244

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ORDER IN QUESTION

The Order which is the subject of this appeal is the decision on July 23, 1997 by the Common Pleas Court of Philadelphia County at numbers 1085-1272-1275.

By Order of the Superior Court dated February 8, 1999, at No. 03642 Philadelphia 1997, the denyiny of the defendant's Post Conviction Relief petition and affirming the Common Pleas Court decision.

STATEMENT OF THE QUESTIONS INVOLVED

Is appellant entitled to Post Conviction Relief, despite the Commonwealth's objection to the contrary?

(Superior Court's answer: No.)

Whether terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

(Superior Court's answer: No.)

Whether a guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

(Superior Court's answer: No.)

Whether ineffective assistance of counsel at all levels of representation resulted in denial of due process.

(Superior Court's answer: No.)

STATEMENT OF THE CASE

PROCEDURAL HISTORY:

The petitioner, who was seventeen years old at the time, having previously been charged with murder and related offenses, was assigned to The Honorable David Savitt for trial on February 13, 1986. At that time, the petitioner plead guilty to second degree murder, and on the same date, was sentenced to mandatory life in prison. At trial, the defendant was represented by counsel Moira Dunworth and after trial, no direct appeal was taken. On or about August 21, 1986, the appellant filed a Post-Conviction Hearing Act petition, and thereafter, Franklin D. Green was appointed to represent the petitioner. An amended petition was filed on March 31, 1987 alleging trial counsel's ineffectiveness. Thereafter, a motion to dismiss hearing was held before The Honorable Joseph D. O'Keefe. On July 25, 1988, an evidentiary hearing was granted and scheduled for November 15, 1988. Mr. Green withdrew from the case, apparently for personal reasons, and then attorney David S. Rudenstein was appointed. Counsel Rudenstein then filed his amended P.C.R.A. petition, which after a hearing before The Honorable James D. McCrudden, it was Ordered dismissed on July 23, 1991. An appeal was filed October 10, 1991 by counsel Rudenstein, alleging trial counsel's ineffectiveness and The Honorable James McCrudden erred by dismissing petitioner's P.C.H.A. petition. On March 30, 1992, the Superior Court affirmed the Lower Courts decision. May 27, 1992, petitioner filed a pro se "Petition for *Permission* to file petition for Allowance of Appeal Nunc Pro Tunc." September 3, 1992, the Supreme Ordered this petition denied. On November 27, 1996, appellant filed a second P.C.R.A. Attorney David Belmont was appointed to represent

appellant on this petition. On June 17, 1997, appellant was notified by Mr. Belmont that he had filed a Turner/ Finley no-merit letter and asked for permission to withdraw from representing the appellant's P.C.R.A. petition. On June 17, 1997, appellant received notice from The Honorable David Savitt, expressing that his petition would be dismissed, but that he had ten (10) days to respond to the notice. On July 7, 1997, appellant filed an objections to counsel Belmont's Finley Letter and the Court's intent to dismiss. On July 23, 1997, appellant's petition was Ordered dismissed by Judge Savitt. A timely notice of appeal was filed. On May 6, 1998, the Commonwealth filed a letter brief stating that the PCRA Court erred by entertaining the petitioner's PCRA petition, and that the Superior Court shouldn't entertain it, because the petitioner is time bar from filing. Petitioner filed a timely reply brief. On December 3, 1998, the Superior Court ordered appellant's petition dismissed. Petitioner then filed a timely motion for reargument, which was subsequently dismissed February 8, 1999.

REASONS FOR ALLOWANCE OF APPEAL

This case presents four substantial questions that the decisions rendered below conflicts with other Superior Court and Supreme Court rulings.

In *Commonwealth v. Alcorn,* supra. that Court noted that in 1995, the General Assembly made modifications to the PCRA to govern time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence becomes final. The

only exception being those cases that can meet the enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A §9545(b)(1)(i)(ii)(iii). When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because this Court had not decided on that case yet. *Commonwealth v. Blackwell,* supra and *Commonwealth v. Lawson,* supra was the law, and still the law. *Blackwell / Lawson* are judicial exceptions created by this Court and should be retained as a valuable relief mechanism to safeguard and check situations such as the present.

Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal. The Trial judge sentenced petitioner to a term of life imprisonment without a discretionary minimum for parole eligibility, which violates his right to a minimum term and parole eligibility date, as was established by 42 Pa. C.S. §9756(c).

A Guilty plea colloquy that failed to ensure that appellant understood the consequences of his plea compels withdrawal of plea. Trial Judge failed to inform the petitioner that by pleading guilty to second-degree murder, that he would receive a mandatory minimum sentence of life *without parole,* a violation of the requirements of Pa.R.Crim.P.319 and the due process provisions of the Constitutions of the United States and Pennsylvania.

Ineffective assistance of counsel at all levels of representation resulted in denial of due process and resulted in a miscarriage of justice. Trial counsel grossly misinformed the appellant, who was then seventeen years old at the

time, that by pleading guilty to second degree murder, he would be released after serving 10 to 15 years. Appellant relied on this information by trial counsel to plead guilty, only to learn that it was false. Trial counsel was ineffective and did not act in petitioner's best interest by inducing him to plead guilty to second-degree murder. PCRA counsel David Rudenstein was also ineffective in failing to subpoena trial counsel at the evidentiary hearing held March 26, 1991 to testify about her ineffectiveness, even after she admitted to him previously, via the telephone, that she didn't explain to the petitioner that he would be receiving a mandatory life sentence of life without parole. This testimony was essential, but yet he failed to call trial counsel.

ARGUMENT I

APPELLANT IS ENTITLED TO POST CONVICTION RELIEF, DESPITE THE COMMONWEALTH'S OBJECTION TO THE CONTRARY

On August 21, 1986, appellant filed a his first Post Conviction Hearing Act Petition challenging the voluntariness of his guilty plea, which occurred on February 13, 1986, six months prior. The disposition of this appeal ended with a denial of an allowance of appeal Nunc Pro Tunc by this Court on September 2, 1992. On November 27, 1996, appellant filed his second Post Conviction Relief Act petition (PCRA). The appellant filed this second *PCRA* petition out of necessity, and in hopes of receiving some measure of justice. In *Commonwealth v. Stark,* 442 Pa. Super. 127, 658 A.2d 816 (1995), that Court held that a conviction cannot stand upon a constitutional error that affected the verdict. Post Conviction review by an appellate court is limited to determining whether a trial court's

findings are supported by the record and whether its order is otherwise free of legal error.

Nevertheless, the Commonwealth argues that appellant is not entitled to any relief, and does not have access to the Courts because of the recent decision in *Commonwealth v. Alcorn,* 703 A.2d 1054 (Pa. Super. 1997). In *Alcorn,* that Court noted that in 1995, the General assembly made modifications to the PCRA to indicate time limits for the litigationo of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petition, not filed within one year of the date the defendant's judgment of sentence became final. The only exception being those cases that can meet enumerated requirements, and a PCRA petition that is filed within one year of the date that the defendant's judgment is final. 42 Pa.C.S.A. § 9545(b)(1)(i)(ii)(iii). Therefore, because appellant judgment of sentence was final March 13, 1986, thirty days after his guilty plea and sentencing and over ten years now, the commonwealth asks that his PCRA petition be quashed.

When appellant filed this second PCRA petition on November 27, 1996, *Alcorn* was not the law, because that Court had not decided that case yet. But, *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989), and *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988) was the law, and is still the law. *Blackwell/Lawson* are judicial exceptions to the waiver doctrine of the old PCRA legislation, and certainly should be retained as a judicial exception under the new PCRA legislation. The *Blackwell/Lawson* standards of review for second and subsequent PCRA petitions serves as a valuable relief mechanism and safeguard to check situations such as the present, and these decisions have not been overruled by

either the Pennsylvania Supreme Court or this Court. As well, *Alcorn,* supra. has not overruled these decisions, nor is it retroactive. So the commonwealth's reliance on this decision is misplaced, It may be assumed that these decisions are no longer valid because they have been overruled by the legislature's enactment of the new PCRA legislation. But if this is true, it creates problems on its own. That being, a violation of separation of powers encroachment on the judiciary and things of this sort. So even though the legislature did not expressly state that *Blackwell / Lawson* was overruled, they made certain that, that would be the result by stating in the text of the statute, "Any petition, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final." This "back-door" encroaching should be recognized by this Court and should be checked. The legislature is not permitted to overrule judicial decisions theoretically, expressly or otherwise, because that is the role of judiciary. Appellant urges this Court to exercise its judicial wisdom in upholding *Blackwell / Lawson,* supra. standards of review for second and subsequent PCRA petitions as a *judicial exception* to the time bar. Appellant believes that the issues presented in the instant case, demonstrates a miscarriage of justice that entitles him to PCRA review. Appellant ask that this Court review his PCRA petition under the *Blackwell / Lawson* standard and remand his case back to the lower courts for further review, or in the alternative, order a new trial based on the allegations raised therein. If this position taken by the Commonwealth is upheld, it would demonstrate a clear breakdown of the adversarial process, as well as a miscarriage of justice. Despite the existence of constitutional errors that remain unresolved in the instant case; errors

that no questions contributed to the verdict in such a way, that it undermined the truth-determining process that no reliable adjudication of innocence or guilt has taken place, the Commonwealth urges this Court to disregard all of that and quash appellant's appeal.

Again, the Commonwealth relies on the retroactive application of the amendments to the PCRA by the General Assembly *42 Pa. C.S.A. §9545(b)(1)* which states:

> (b) *Time for filing petition.*
>
> (1) Any petition under this subchapter, including a second or subsequent petition shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

Based on this section and the opinion rendered in *Commonwealth v. Alcorn,* supra., the Commonwealth's contention is that appellant is time barred from filing his second PCRA petition, and this Court does not have jurisdiction to entertain this appeal. This new amendment to the PCRA process is a severe instance of retroactivity that deprives appellant of procedural and substantive Due Process, as well as access to the Courts under the 14th. Amendment to the United States Constitution. Appellant's second PCRA petition was filed in November 27, 1996, over ten years after the final judgment was rendered in his case. Appellant challenges the PCRA's one year statute of limitation to petitions arising from judgment that became final *prior to the effective date of the PCRA.* Prior to the passage of the new PCRA legislation, a petitioner had the right to file a petition at any time after a conviction became final. The Pennsylvania Superior Court and this Court has held in previous decisions that the delay in

filing a PCRA petition, standing alone, was not a sufficient reason to deny the petition, but that the delay may be considered as a factor in assessing the petitions merit. *Commonwealth v. Johnson,* 516 Pa. 407, 532 A.2d 796 (1987); *Commonwealth v. McCabe,* 359 Pa. Super. 566, 519 A.2d 497 (1986). The Pennsylvania General Assembly has decided to take on the role of judiciary and decide that, delay by itself, can result in the dismissal of a PCRA petition. *§9545(b)(1),* supra. Thus, an individual whose conviction becomes final on or after January 16, 1996 have one year in which to file a PCRA petition, unless he/she meets one of the enumerated exceptions which follows:

> "(i) The failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claims are predicted were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a Constitutional right that was recognized by the Supreme Court of the United states or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that Court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days from the date the claim could have been presented."

Id. § 9545(b)(1)(i)(ii)(iii)(2). Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the legislature stripped appellant's rights and fair expectations as of February 13, 1986. This is completely unfair. The rights appellant had, that is, to file a PCRA petition at anytime after his conviction, was vested rights, and clearly, legislation such as the one at issue, cannot retroactively bar a petitioner from his/her ability to have a court consider the propriety of a PCRA petition without first having a reasonable time to bring the claim. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others similarly situated, due process of law, as well as access to the courts.

In *Miller v. Florida,* 482 U.S. 432, 107 S.Ct. 2446, 96 Led.2d. 351 (1951), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition. In this sense, Ex Post Facto violations could be implicated. Applying the PCRA retroactively to strip completely the right of prisoners, such as appellant, to petition for PCRA relief, would be entirely unfair and a severe instance of retroactivity. The U.S. Supreme Court

has held that new legislation shortening a statute of limitations must also allow pre-existing claimants a reasonable time in which to file their claims:

> [I]t may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; *if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily,* whatever might be the purported of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action . . . "

Texaco v. Short, 454 U.S. 516, 527 n.21, 102 S.Ct. 781, 791, n21 (1982), (Quoting *Wilson v. Iseminger,* 185 U.S. 55, 22 S.Ct. 573 (1902). The Due Process Clause, is the forerunner in protecting the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause may not suffice to warrant retroactive application. The Due Process clause has the ability to check the legislature's unmatched power that allow it to sweep away settled expectation suddenly and without individualized consideration.

So again, the Commonwealth reliance on *Commonwealth v. Alcorn,* supra. is misplaced. The Commonwealth argues that appellant has not established any claim that is recognizable by the limited exceptions to the time bar. Appellant believe and avers that he is also entitled to relief under *§9545(b)(1)(ii)* supra. Appellant who was seventeen years old when he entered his guilty plea on

March 13, 1986 and has no prior experience with the judiciary system, was an unskilled layman, completely ignorant of the law. Immediately upon learning the information provided to him by trial counsel was false, he filed a PCHA petition on August 21, 1986, Furthermore, appellant believes that the issue at bar concerns a question of waiver, not a question of jurisdiction as the Commonwealth argues. Since appellant could not, and still cannot allege PCRA counsel ineffectiveness for his failure to provide adequate assistance on the collateral matter; their actions went unchecked, and could have only been challenged by appellant filing this subsequent PCRA petition. *See: Commonwealth v. Beasley,* 678 A.2d 773 (1996). This Court held in *Commonwealth v. Christy* 540 192, 656 A.2d. 877 (1995), that an allegation that prior counsel was ineffective for failing to raise an issue *will* overcome the waiver provision of the PCRA *as long as appellant had a constitution right to counsel at the stage in the proceedings where counsel's ineffectiveness resulted the waiver.* All the issues that appellant is raising are trial related. Appellant challenges the illegality of his sentence, which the courts have ruled is a issue never waived. *Commonwealth v. Campbell,* supra. Appellant also challenges his guilty plea colloguy that is defective, because it fails to inform the appellant that he would be ineligible for parole by pleading guilty. This issue has never been raised and could not have been raised prior to 1992. Lastly, appellant raises the issue of ineffective assistance of all counsels. This is not a blanket accusation of ineffectiveness against all prior counsels. Appellant substantiates this claim by trial counsel's own admission to PCRA counsel Rudenstein (see exhibit D), where trial counsel acknowledge that she did not inform the appellant of the consequences of his plea. But, PCRA counsel Rudenstein, still failed to subpoenaed

her to testify on March 26, 1991, to explain exactly what she told appellant concerning his being released. These actions/ or inaction by trial counsel and PCRA counsel, must be checked.

Nevertheless, the appellant still believes that he meets the enumerated requirements for permitting a second and subsequent PCRA petition. – While it is true that petitioner did not previously articulate the fact that his delay in filing the current PCRA petition was the result of government interference, which would satisfy *42 Pa.C.S.A. § 9545(b)(1)(i),* its was in fact the reason why appellant failed to timely file his current PCRA petition. Because appellant believed that the amended PCRA legislation was not retroactiv specifically section *§545(b)(1),* he did not feel compelled to immediate file his current PCRA petition, especially since he was unprepared to do so. As previously stated, appellant believes and there fore avers that, "the failure to raise the claim previously was the result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States." *See: 42 Pa. C.S.A. § 9545(b)(1)(i).* Petitioner maintains that as result of the Camphill disturbance on October 25 and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, impaired petitioner's ability to proceed with filing the current PCRA petition. To further support petitioners argument, enclosed herewith, as ***Exhibit E***, is partial letter which was written by appellant to the Clerk of Courts, than Peter Truman, and the letter was date stamped February 14, 1990. In the letter to the Clerk of Court, appellant is clearly explaining to the clerk that all

of his legal documents were destroyed after the durturbance Camphill in 1989. This petitioner believes should be sufficient reason to excuse his failure to timely file his current PCRA petition.

ARGUMENT II

TERMS OF LIFE IMPRISONMENT IMPOSED WITHOUT A DISCRETIONARY MINIMUM TERM FOR PAROLE ELIGIBILITY FOR CRIMES EXCEPT FIRST AND SECOND DEGREE ARSON-MURDER ARE ILLEGAL.

Appellant's argument is straight forward and simple, to Wit, that the PCRA Judge David N. Savitt erred when he granted PCRA counsel David Belmont's finley no-merit letter and when he dismissed the petitioner's PCRA petition. The appellant challenges the legality of his life imprisonment sentence without a discretionary minimum term for parole eligibility, which is an illegal sentence. This issue has never been raised before by the petitioner, nor should it be considered waived, because it is essentially an attack on the legality of the sentence, which is illegal, and would entitle the petitioner to an explicit minimum term that will engender parole eligibility.

In *Commonwealth v. Finley,* 330 Pa. 313 479 A.2d 568 (1984), which have adopted the procedures established in *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel when requesting to withdraw his/her presentation of a defendant, must do so with an accompanying brief listing each issue the defendant wished to have raised, followed by an explanation as to why those issues are without merit. In the instant case, appellant challenges the legality of his life sentence

without a discretionary minimum term. Appellant has maintained this argument throughout the proceedings in this current PCRA petition.

But never do counsel Belmont acknowledge this argument or attempt to explain why this issue raised by appellant is without merit. In accordance with the rules of *Finley,* Judge Savitt should have concluded after his independent review or full examination of the record, that counsel Belmont's request to withdraw his representation should be dismissed. At best, he should have required counsel to address appellant's issues. So Judge Savitt erred when he granted counsel counsel's request to withdraw, and thus dismissing appellant's PCRA petition.

This issue by appellant is limited solely to the sentence rather then conviction, this is a challenge to the legality and constitutionality of the mandatory sentence imposed and, therefore, could not have been waived. *42 Pa.C.S.A. §9781(a); Commonwealth v. Campbell,* 351 Pa. Super. 56, 505 A.2d 262 (1986). Where the court failed to inform the appellant of his right to file a motion challenging the propriety of a mandatory sentence of life imprisonment without parole, the issue of the constitutionality of a life sentence has not been waived because it is essentially an attack on the legality of sentence. *Commonwealth v. Middleton,* 320 Pa. Super. 533 n. 5; 467 A.2d 841 (1983); Pennsylvania Rules of Criminal Procedure, Rule 1405(c)(2).

The Honorable Judge Savitt sentenced appellant Pace to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming, for the sake of this argument only,

that the court properly sentenced the appellant to a life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by *42 Pa.C.S., §9756(c).* That section provides:

> (c) Prohibition of Parole. – Except in the case of
>
> murder of the first degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because appellant was not convicted of first decree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under §9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. *1 Pa.C.S.§1924.* ("Exceptions expressed in a statute shall be construed to exclude all others"). As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986), applying 1 Pa.C.S. §1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although §9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which,

on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, *61 Pa.Stat.§331.21*, provides that:

> The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, *61 Pa.Stat. §331.17*, bestows on the parole board the exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of Title 42 and 331.21 of Purdon's title 61, although codified in different titles of the Pennsylvania penal law, are statutes *"in pari materia"* because they "relate to the same persons or things or to the same class of persons of things." 1 Pa.C.S. §1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are *"in pari materia"* with one another and with the relevant sections of Title 61, should be read together, in a manner that, "if possible, [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the appellant have been convicted of second degree murder and face life sentences, to a non

parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Yet read and applied in relation to the pertinent portions of the Crime Code and according to the Commonwealth's codified principles of statutory construction, the two statutes are, in fact, reconcilable.

There are two methods of reconciling the statutes to give both of them effect. The first is to recognized that in 1941, when the Title 61 provisions were enacted, Act of august 6, 1941, P.L. 861, the offense of murder of the first degree was the offense for which a term of life imprisonment was provided. Section 9756 (c) was not enacted until 1974. Act of Dec. 30, P.L. 1052, No. 345, transferred to Title 41 an recodified by Act of Oct. 5, 1980, P.L. 693, No. 142, §401(a). Giving effect to the language of 69756(c), it becomes clear the General Assembly did not intend to extend the reach of §331.21 to cover life sentences imposed in other than first degree murder cases. Thus, the enactment of what is now §9756(c) as part of the same 1974 criminal code reform that separated felony murder from willful and premeditated murder establishes parole eligibility in those cases.

The other method of reconciling Section 9756(c) and 331.21 involves a careful examination of the life terms provided in the Crimes Code. The legislature has specified that the terms of life imprisonment provided for certain aggravated types of murder shall be without parole. For examples, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without the right to parole*"; the same is provided for arson-related murder in the second degree. In contrast, in section 1102(b), under

which Pace was 18 Pa.C.S. sentenced, no such prohibition appears, nor does it in 18 Pa.C.S. §1102(a), which provides a term of life imprisonment for murder in the first degree. This demonstrates that the legislature was explicit about prohibiting parole where it intended to do so. *Cf.* 1 Pa.C.S. Section 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.") It did not intend to bar for life terms imposed, *inter alia,* under Section 1102(b).

When this statutory scheme is construed with sections 9756(c) and 331.21, it becomes clear that where the latter section provides parole release for "convicts . . . serving life imprisonment," it must be read as referring to those offenses for which the legislature has specified terms of life imprisonment without a the right to parole. This reading that "[w]henever a general provision in a statute [the provision in section 331.211 shall be in conflict with a special provision in . . . another statute [the opposite prohibition in Section 9756(c)), the two shall be construed, if possible, so that effect may be given to both." 1 Pa.C.S. Section 1933.

Alternatively, Sections 9756(c) and 331.21 may be seen as irreconcilable. The principle of statutory construction that statute "*in pari materia*" should be construed together is not absolute; the statute says this shall be done "if possible." 1 Pa.C.S. Section 1932 (b). If it is not possible to give effect to both of these statutes, then Section 331.21, as it pertains to persons serving life sentences for all offenses except first degree murder, must be seen as implicitly repealed, in pertinent part, by the later-enacted section 9756(c). Under 1 Pa.C.S. Section 1936, "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." See

also 1 Pa.C.S. section 1971 ("a later statute shall not be construed to supply or repeal an earlier statute unless the two statutes are irreconcilable." Section 9756(c) of Title 42 was enacted after Section 331.21 of Title 61, as discussed above. See also 1 Pa.C.S. section 1928(b)(1) (penal provisions shall be strictly construed); *Commonwealth v. Darush,* 256 Pa. Super. 344, 389 A.2d 1165, 1158 (1978) (strict construction is in favor of the defendant); *Commonwealth v. Cluck,* 252 Pa. Super. 228, 381 A.2d 472, 477 (1977) (any ambiguity in penal statutes must be resolved in favor of life and liberty).

In *Castle v. Pennsylvania Board of Probation and Parole,* 123 Pa. Comw. 570, 554 A.2d 625 (1989), *all app. denied,* 567 A.2d 653 (1989), an action by a prisoner to compel the scheduling of a parole hearing, the other intermediate appellate court rejected the argument that section 9756(c) gave the defendant, there serving a life sentence for second-degree murder, a right to parole consideration and thereby implicitly repealed the contrary provisions in 61 Pa.Stat. Section 331.21. *Id.* at 628-29. The basis of its decision was the asserted lack of a stated purpose of Section 9756 to create parole eligibility, and the fact that the section only governs action by the trial court and not the parole board, whereas section 331.21. prohibits the board from paroling prisoners serving life terms. *Id.* For these reasons, the court did not find the two statutes "clearly irreconcilable," a prerequisite for finding repeal by implication. *Id.* at 629.

This court should decline to follow *Castle* here for two reasons. First, the *Castle* court was incorrect in stating that Section 9756 did not have as its purpose the creation of parole eligibility. Subsection (c) of that section is entitled "Prohibition of Parole," and expressly concerns parole

eligibility. It lists specific instances in which the court may sentence without the right to parole, stating that these are the "only" such instances. In light of the codified principle of statutory construction that exceptions expressed in a statute exclude all others, 1 Pa.C.S. Section 1924, it is clear that this subsection had as its purpose to and did create parole eligibility for all offenses not specified.

Second, because the General Assembly did intend Section 9756(c) to create parole eligibility, the *Castle* court was wrong in deciding that it was not irreconcilable with section 331.21. Thus, we are left with the anomaly of one statute providing a right to parole, and another prohibiting the only body empowered to release on parole from doing so. It is presumed that the "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. Section 1922(1). The result of *Castle* is all three of these. In any event, this appeal *does* concern action of the sentencing court, which is expressly bound by Section 9756(c) and (c). Thus, at the least, this case may be readily distinguished on that basis.

All sentences imposed in Pennsylvania are for the maximum sentence. Maximum sentences are the "legal and valid" sentences imposed. *Commonwealth v. Daniels,* 430 Pa. 442, 243 A.2d 400 (1968). "The word 'sentence' when unmodified by the word 'maximum' or 'minimum' necessarily refers only to the maximum sentence for that is the legal sentence." *Commonwealth v. Glover,* 397 Pa. 543, 546-47, 156 A.2d 114 (1959). "The legislature has the right to fix the maximum penalty and likewise can, if it see fit, name the minimum." *Id.* at 5454. "When the legislature has desired to provide for a mandatory minimum in the past it has done so in unequivocal language." *Id.* at 547. The General Assembly has confirmed the

Glover court's analysis by subsequently adopting the mandatory Minimum Sentencing Act, 42 Pa.C.S.A. Sections 9712, 9714, in which specific sentences are deemed to be mandatory minimum sentences, none of which include sentences of life imprisonment. If minimum sentences 'are not implicated much less mandated by the sentencing statute, then the discretion of the trial court is necessarily the controlling factor.' *Commonwealth v. Button,* 332 Pa. Super. 239, 244; 481 A.2d 342 (1984).

The legislature clearly intended to distinguish punishment for first-degree murder and second-degree felony murder from other criminal offenses, a goal accomplished by mandating the harshest *Maximum penalty* of total confinement available. Inasmuch as the Statutory Construction Act, 46 P.S. Section 558, requires that all "penal provisions" be strictly construed in such a way that " . . . when a criminal statute calls for construction it is not the construction that is supported by the greater reason that is to prevail, but that one which, if reasonable, operates in favor of life and liberty . . ." *Commonwealth v. Glover,* supra; *Commonwealth v. Pristas,* 222 Pa. Super. 254, 260-61; A.2d 114 (1972). 18 P.S. Section 4701, 18 Pa.C.S.A. Section 1102 and 2502 and 42 Pa.C.S.A. Section 9711, must be deemed to mandate only maximum sentences of life imprisondment, not minumum setences as construed by courts and administrative agencies. It is apparent that the Superior Court views life sentences in Pennsylvania to be parole eligible inasmuch as the seven states cited by that Court as rationale for the constitutionality of consecutive sentences *all* provide for life sentences with specific minimum sentences, four which have no provision for "life without parole." *Commonwealth v. Button,* supra, 245, n. 1.

This construction of the above cited statutes is a reasonable one that "operates in favor of life and liberty." First, imposition of a sentence without a stated minimum results in a "flat" sentence with an implied minimum of one day prior to June 27, 1978. *Commonwealth v. Ulbrich,* 462 Pa. 257, 258; 341 A.2d 68 (1978); *Commonwealth v. Butler,* 458 Pa. 289, 294: 328 A.2d 851 (1974); *Commonwealth v. Auschbacher,* 276 Pa.Super. 554, 556; 419 A.2d 596 (1980). Second, life-sentenced prisoners are not precluded from the benefit of 19 P.S. Section 1057:

> Whenever any person, convicted in any court of this Commonwealth of any crime punishable by imprisonment in a state penitentiary . . . the court . . . shall pronounce upon such convict a sentence of imprisonment for an indefinite term stating in such sentence the minimum and maximum limits thereof . . .

Commonwealth v. Bulter, supra., at 291. The only parameters placed upon the minimum sentences to be imposed by the court is that "the minimum shall never exceed one-half of the maximum sentence." 19 P.S. Section 1057; 42 Pa.C.S.A. Section 9756(b). This implies that the only minimum sentence precluded by these statutes when the maximum sentences is life imprisonment is "life" itself, the very sentence presumed by the judiciary and administrative agencies.

Certainly a sentencing court may not sentence one convicted of second-degree felony murder to a lesser *Maximum* sentence than life imprisonment. The *Castle* court erred by assuming that sentences of life imprisonment are other than simply maximum sentences. Given that two purposes of the Crimes Code, 18 Pa.C.S.A. Section 104(3)(5), effective June 6, 1973, are to "safeguard

offenders against excessive, disproportionate, and arbitrary punishment" and "to differentiate among offenders with a view to just individualization in their treatment," and that components of the Crimes Code are to be construed in terms of these purposes, it is necessary to reconcile 18 P.S. Section *4701, 19 P.S. Section 1057, 18 Pa.C.S.A. 1102, 1321(e) and 2502 42 Pa.C.S.A. Section 9711 and 9756, inasmuch as none preclude another. "While [parole] is an amelioration of punishment, *it is in legal effect imprisonment. Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 589; 28 A.2d 897 (1942); *Anderson v. Corall,* 26 U.S. 193; 44 S.CT. 43 (1923). If, under Pennsylvania law, a sentences to a five to ten year term of imprisonment is construed a ten-year sentence, *United States ex rel. McNeils v. Pa. Board of Parole.,* 141 F.Supp. 23 (1956), a sentence of one day to life imprisonment must be construed a sentence of life imprisonment and, therefore, in compliance with the foregoing statutes.

An overview of the foregoing statutes, either individually or *in pari materia,* raises reasonable constructions that favor life and liberty much more than past and current interpretations. First, the parole Act, adopted August 6, 1941, and amended to create the Pennsylvania Board of Probation and Parole December 27, 1965, has been explicitly repealed insofar as it is inconsistent with subsequent legislation, that is, with the phase 'or serving life imprisonment,' as found at 61 P.S. Section 331.21. The most noteworthy statutory refinement regarding parole eligibility for sentences of life imprisonment is found in the clear and concise language of 42 Pa.C.S.A. Section 9756, effective March 30, 1975. In Section 9756(c), the General Assembly very succinctly defined these offenders to whom parole eligibility *Must* be afforded and those to

whom the right to parole *may* be provided. Even the most cursory perusal of Section 9756(c) dictates the conclusion that, except for four (4) specific categories of offenses, the court may impose a sentence with parole eligibility Conspicuously absent from that group of offenses are second-degree felony murder [18 Pa.C.S.A. Section 1102(b)], and a subsequently conviction for an unrelated homicide [42 Pa.C.S.A. Section 9715], all of which mandate a sentence of life imprisonment. "A change of language in subsequent statutes on the same matter indicates a change of legislative intent." *Haughey v. Dillon,* 379 Pa. 1, 6; 108 A.2d 69 (1954); *Commonwealth v. Garcia,* 474 Pa. 449, 477; 378 A.2d 1199 (1977). Therefore, if the court properly sentences appellant Pace to a life term, it violated 42 Pa.C.S. Section 9756(b) and (c) by failing to set a minimum sentence, at the completion of which defendant would be eligible to be parole.

ARGUMENT III

GUILTY PLEA COLLOQUY THAT FAILED TO ENSURE PETITIONER UNDERSTOOD CONSEQUENCES OF PLEA COMPELS WITHDRAWAL OF PLEA.

Appellant entered a plea of guilty in open court to the charges of second-degree murder and possession of an instrument of crime. [N.T. pg 27]. Appellant subsequently received a life sentence without a stated minimum sentence for parole eligibility. Both the court and trial counsel failed to ascertain on the record whether appellant understood the nature and consequences of his guilty plea. Such a defective colloquy violated the requirements of Pa.R.Crim.P.319 and the due process provision of the

Constitutions of the United States and Pennsylvania, and compels withdrawal of appellant's plea.

Moreover, trial counsel grossly misinformed appellant and his family that he would be eligible for parole after serving 10 to 15 years in the state prison system. Prior to appellant entering his guilty plea, trial counsel Dunworth met with appellant's biological parents and brother to discuss the case and secure the family's support, since appellant was still a juvenile at the time. Attorney Dunworth informed appellant's family that it was her professional opinion that appellant should plead guilty to second degree murder. Attorney Dunworth also informed the family that appellant would have to serve 10 to 15 years before he would be eligible for parole. Based on their understanding of counsel's statements, the family advised appellant to plead guilty to second degree murder. [See Affidavits at Exhibit A, B, and C]. Appellant, who was seventeen at the time, would not have plead guilty had he known that he would have to spend the remainder of his life behind bars without becoming eligible for parole. As well, trial counsel admitted to appellant's former court appointed PCRA counsel David Rudenstein of her failure to properly advise appellant and his family of the consequences of his plea to second-degree murder; simply because, "she had an emotional time dealing with appellant and his family as a prospect of serving a life sentence." [See Exhibit D].

This issue has not been litigated before, nor should it be considered waived, because the Superior Court did not determine until 1992, in a case characterized as one of "first impression," that a sentence of life imprisonment is a *mandatory minimum* term. *See: Commonwealth v. Yount,* 615 A.2d 1316, 19-21, thus precluding a challenge to this

holding prior to 1992. Therefore, Judge Savitt erred when he permitted court appointed PCRA counsel David Belmont to withdraw his representation without amending appellant first PCRA petition, or requiring that counsel in his *Finley* Brief show reasons why this issue is without merit. Additionally, Judge Savitt failed to state in his opinion denying appellant's PCRA petition, his reasons why this particular issue is without merit. Judge Savitt fails to even make mention in his opinion that appellant raised this claim. The Honorable Judge Savitt should have examined the record and then determine if the issue raised was wholly frivolous. *See: Commonwealth v. Finley,* supra, at 570.

Appellant's argument is that if the conclusion of the *Castle* Court is that terms of life imprisonment imposed are mandatory minimum sentences; then the Honorable Court erred by accepting appellant's guilty plea without informing him or insuring that he understood that a consequences of his plea he would be serving a term of life imprisonment without parole. Appellant did not know that as a result of his plea, that he would spend the remainder of his life behind bars without becoming eligible for parole. Had he known, he would not have pleaded guilty. Such a defective colloquy violated the requirements of Pa.R.Crim.P.319 and the due process provisions of the Constitutions of the United States and Pennsylvania, and compels withdrawal of Petitioner's plea.

The United States Supreme Court has consistently applied stringent standards for testing the validity of a guilty plea; that is, that it was made voluntarily after proper advice and full understanding of the consequences of the plea. *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166 (1969).

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable of canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences,

Boykin v. Alabama, 385 U.S. 238, 244; 89 S.Ct. 1709, 1712 (1969).

In Pa.R.Crim.P.319, the goal of which is "assurance that a defendant's guilty plea is tendered knowingly, intelligently, voluntarily and understandingly," *Commonwealth v. Persinger,* 532 Pa. 317, 322, 615 A.2d 1305 (1992), is but a restatement of this constitutional principle as well as existing law and practice. As the Third Circuit has said:

> We therefore reach the same conclusion as did the Ninth Circuit in *Munich v. United States,* 337 F.2d 356 (1964): "[O]ne who, at the time of entering a plea of guilty, is not aware of the fact that he would not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea."

Berry v. United States, 312 F. 2d 189, 193 (3rd Cir. 1969). Thus, failure to advise appellant of the consequences of his plea-ineligibility for parole is equal to a denial of due process. "[P]rejudice inheres when an accused pleads guilty thus convicting himself of a criminal offense, without understanding the significance or consequences of his action." *Id.* at 191.

The mandate of Pa.R.Crim.P.319, as well as its federal counterpart, Fed.R.Crim.P.11, is designed to ensure that the pleader is apprised, at the very least, of the period of

required incarceration. Loss of parole eligibility is "an inseparable ingredient of the punishment imposed." *Id.* at 192; *In re Grand Jury Investigation,* 542 F.2d 166, 173 (3rd Cir. 1976), *cert. denied,* 429 U.S. 1047 (1977). Failure to impart information regarding "the worst to expect," in term of imprisonment is a failure to explain the consequences of a plea. *Roberts v. United States,* 491 F.2d 1236, 1238 (3rd Cir. 1974). The worst conceivable term of imprisonment is life imprisonment without parole.

Ordinarily, it would not be necessary for a trial court to include an explanation of probation or parole in its inquiry into a defendant's understanding of his plea. However, circumstances surrounding a plea that mandates a sentence of life imprisonment without the possibility of parole in not ordinary. The particular status of such defendants bring into mechanical operation a legislative directive severely restricting the freedom of action of the sentencing judge as well as the parole authority. "Under such circumstances, the knowledge of ineligibility for parole is as necessary to an understanding of the plea as is the knowledge of the maximum sentence possible." *Berry v. United States,* supra. at 192-193.

This constitutional principle was applied to Pennsylvania law by the Third Circuit Court of Appeals in *United States ex rel. Crosby v. Brierley,* 404 F.2d 790 (3rd cir. 1968), overruled *United States ex rel. Grays v. Rundle,* 428 F.2d 1401 (3rd Cir. 1970). The *Crosby* Court stated that *Pa.R.Crim.P.319* anticipates:

> . . . an inquiry of the defendant to form the factual basis that the plea is "competently and intelligently made". . . . Trial courts have a duty . . . to insure that the defendant understands the consequences of his plea. This is not so much the result of promulgations of federal and state rules of criminal procedure as it is a part of the basic concepts of proper judicial administration in Pennsylvania. . . .

Id. at 794. The rationale of *Berry,* that failure to advise a defendant, prior to acceptance of a guilty plea, of ineligibility for parole denies due process, was adopted by this in *Commonwealth v. Zober,* 466 Pa. 453, 461; 353 A.2d 441, 445 (1976).

The mandatory nature of Rule 319 was clearly established in *Commonwealth v. Ingram,* 455 Pa. 198, 316 A.2d 77 (1977). Other cases indicate that six specific areas of inquiry must be explored, the most relevant being whether the defendant is aware of the permissible range of sentences for the offenses charged. *Commonwealth v. Willis,* 417 Pa. 50, 52, 369 A.2d 1189 (1977); *Commonwealth v. Fay,* 294 Pa. Super. 332, 337, 439 A.2d 1227 (1982). Lack of such inquiry or notice deprives the defendant of "the right to weigh the alternatives of going to trial versus entering a guilty plea . . . because of the real possibility . . . that he was misled or acted pursuant to inaccurate or incorrect information" [*Commonwealth v. Leonhart,* 358 Pa. Super. 494, 501, 517 A.2d 1342 (1986)] and require that the defendant be allowed to withdraw his guilty plea. *Commonwealth v. Kulp,* 476 Pa. 358, 382 A.2d 1209 (1978). Before accepting a plea of guilty, the court must insure that the defendant understands the meaning of words like "consecutive". *Commonwealth v. Guyton,* 331 Pa. Super. 231, 480 A.2d 330 (1984). No less important are words and phases like *life imprisonment* and *mandatory minimum sentences.* "[N]o plea may be viewed as voluntary that is the product of ignorance." *Commonwealth ex rel. West v. Myers,* 423 Pa. 1, 5-6, 22 a. 2d 918 (1966).

The explicit purpose of the Crimes Code, "to give fair warning . . . of the sentences that may be imposed on conviction of an offense," is relevant. *18 Pa.C.S. §104(4).* Significantly, the ABA Standards For Criminal Justice, Second Edition at 14-1.4, provides the following:

> (a) the Court should not accept a plea of guilty . . . from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:
>
> . . . . (ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the *mandatory minimum sentence,* if any, on the charge, or any special circumstances affecting probation or release from incarceration. (emphasis added)

This Court held in *Commonwealth v. Persinger,* supra. at 323-24, that the reasoning behind the above standard is sound because it insures that the defendant appreciate the significance and consequences of his plea. *See:* also *Commonwealth v. Fay,* 294 Pa.Super. at 237. This Court went on to hold that failure of the trial court to abide by this standard results in the defendant suffering *manifest injustice.* Appellant contends that such miscarriage of justice mandates that neither "delay" nor "multiple petitions" bar PCRA or federal habeas corpus challenges to this denial of due process.

Analogous to *42 Pa.C.S. §4718,* Sections 4701, 1102, 2704, and 9715 contain no notice requirement prior to imposition of a mandatory minimum term of life imprisonment. However, "there can be no mistake that notice of intention to pursue a mandatory minimum sentence under *§ 9718* is necessary . . . before acceptance of guilty plea. Moreover, it is clear that such a requirement is born not

legislative enactment, but rather from judicial interpretation of due process guarantees whose purpose are to inform defendant of *all* of the consequences of entering a guilty plea before the act has become *fait accompli* . . . What is important is that Appellant was made aware of the consequences of his action *prior* to the acceptances of his plea." *Commonwealth v. Boyles,* 414 Pa.Super. 282, 293, 606 A.2d 1201.

A guilty plea may be attached after sentencing on three grounds: legality of sentence, jurisdiction of the court, and the voluntary, knowing, and intelligent nature of the guilty plea itself. *Commonwealth v. Alston,* 387 Pa.Super. 393, 564 A.2d 235 (1989). In determining whether guilty plea is voluntarily and understandingly entered, it is mandatory that the court ask questions to ascertain the defendant's awareness of the permissible range of sentences. *Commonwealth v. Persinger,* 532 Pa. at 321. The absence of this inquiry from the transcripts renders the colloquy defective Which, in turn, provides adequate groups for withdrawal of the plea. Counsel's failure to seek withdrawal of Petitioner's plea was, therefore, prejudicial to appellant. *Id.* at 234.

In the instant case, the Honorable Court failed to advise appellant that a consequences of his plea would be a mandatory minimum term of life imprisonment. The Court only made reference to the maximum penalty:

> Q [The Court]: If I find you guilty or if I accept the plea to second degree murder, you must know that the sentence is life imprisonment. Do you understand that?
>
> A: Yes.

N.T.43. Appellant was unaware that the forfeiture of his right to a trial by jury would result in his removal from society, without eligibility for parole, for the remainder of his life. The Court in *Commonwealth v. Carey,* 235 Pa. Superior Ct. 366, 371-72 340 A.2d 509-11 (1975), and *Commonwealth v. Bying,* 364 Pa. Superior Ct. 636 (1987) states that the voluntariness of a waiver may be vitiated by misrepresentation as to sentencing if the defendant is shown to have relied on the misrepresentation when making the decision to waive a jury trial.

That appellant was misinformed about the consequences of his plea is also evident by the comments guilty plea Attorney Dunworth made to Petitioner's PCRA/ Superior Court counsel, David S. Rudenstein:

> .... your prior counsel admitted to me on the telephone that she did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for you and your family.

[See Exhibit D, supra.]. Trial counsel made these statements to PCRA counsel Rudenstein, that she did not inform appellant that he was pleading guilty to life sentence without parole eligibility. Moreover, her statements to both the appellant and his family [See Exhibits A, B, and C, supra.]. that he would be eligible for parole sometime after serving ten to fifthteen years was completely misleading and inaccurate to appellant. In *Strader v. Garrison,* 611 F.2d 61, 65 (1979), the Forth Circuit held that, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel;" *See: Sparks v. Sowders,* 852 F2d. 882, 885 (6th Cir. 1988).

Whether the Court was aware or unaware that appellant's understanding was factually and legally erect may be irrelevant. What is relevant is that the Court allowed petitioner to plead guilty believing that he would be eligible for release after serving a certain amount of time. If appellant known of the true and correct nature of the penalty, he would not have plead guilty. The Court's acceptance of his guilty plea under these circumstances and others, then was a complete miscarriage of justice warranting the withdrawal of the plea because before a guilty plea is accepted, a defendant must be aware of the outer limits of the punishment and the full consequences of the plea.

ARGUMENT IV

INEFFECTIVE ASSISTANCE OF COUNSEL AT ALL LEVELS OF REPRESENTATION RESULTED IN DENIAL OF DUE PROCESS.

The threshold inquiry into claims of ineffective assistance of counsel is: (1) does the underlying issue have merit, (2) was the course chosen by counsel designed to effect Petitioner's interest, and (3) did counsel's omission prejudice Petitioner. *Commonwealth v. Persinger,* supra 532 Pa. at 321.

In addition to the substantive defects in the plea colloquy set out previously, appellant contends that trial counsel was ineffective for failing to correct these defects prior to the entry of his plea. This ineffective assistance of counsel caused appellant to enter his plea unknowingly, untelligently, involuntarily, and without a full understanding of the consequences.

Trial counsel was ineffective for failing to insure that appellant, who was seventeen years old at the time, understood the terms and consequences of the plea, and explain or have the court explain that a life sentence was a mandatory minimum sentence without parole eligibility. Additionally, counsel's misleading and inaccurate statements to the appellant and his family that he would be eligible for parole after serving ten to fifteen years violated appellant's Constitutional right to competent and effective counsel. Despite trial counsel's belief that there was a defense to first and second-degree murder, she still advised the appellant to plead guilty. *See: N.T. at pg. 16.* As a result of this ineffective assistance, appellant entered his plea without a full understanding of the consequences, in violation of his constitutional rights. Trial counsel's derelictions were not reasonably designed to advance appellant's interests. In fact, counsel's deficient performance caused appellant to enter his plea unknowingly and involuntarily. *See: Commonwealth v. Persinger,* supra. at 323-24. The purpose of the plea colloquy is to insure that a defendant enters his plea knowingly, intelligently, and voluntarily, but it can not be said that trial counsel advanced appellant's interests when her deficient performance prevented this from occurring. For similar reasons, appellant was prejudiced by counsel's ineffective assistance, as counsel's deficient performance led him to enter the plea unknowing and involuntarily, thereby depriving him of his constitutional right to jury trial. Counsel's ineffectiveness further prejudiced appellant in that he has spent the past thirteen and a half years in prison as a result of a conviction that resulted from a defective and unlawfully induced guilty plea.

Thereafter, trial counsel was ineffective for failing to file a motion to withdraw the guilty plea when she knew or should have known that there was a factual and/or legal basis for the withdrawal of the plea. Appellant did not seek to withdraw his guilty plea based on the issues raised herein until because trial counsel led him to believe that there was no basis for such action and because previous appellate counsel were ineffective. Furthermore,:

> [t]he Commonwealth's position is, in essence, that appellant, who was a juvenile at the time, should have recognized, without assistance of counsel, the defect in the guilty plea colloquy and his counsel's ineffectiveness. The law does not expect so much of appellant, a layman.

Commonwealth v. Allen, 278 Pa. Super. 501, 508, 420 A.2d 653, 656 (1980). In *Commonwealth v. Wilks,* 250 Pa. Super. 182, 191, 378 A.2d 887, 891 (1977), that Court held that "to require a criminal defendant to recognize the ineptitude of his lawyer would be unreasonable."

In *Persinger,* this Court held that defense counsel was ineffective for failing to file a motion to withdraw pleas of guilty when the defendant was never advised of the possibility of consecutive sentences. In that case this Court reasoned that the defendant's claim was of arguable merit because the defect in the plea colloquy rendered the plea unknowing and involuntary, rising to the level of a manifest injustice for the reasons previously discussed. Therefore, a basis existed for the withdrawal of the plea. Having found that the defendant's claim was of arguable merit, this Court concluded that he was prejudiced by counsel's failure to file a motion to withdraw the plea. *Commonwealth v. Persinger,* supra. This Court then concluded, without the benefit of an evidentiary hearing, that there

could have been no reasonable basis designed to advance the defendant's interests for counsel's failure to file a meritorious motion on the defendant's behalf. Similarly, in the instant case, the failure to file a motion to withdraw the plea was not designed to advance Petitioner's interests and therefore prejudiced him.

In the instant case, neither counsel nor the trial court explained to appellant, nor did either seek to ascertain if he understood, that a consequence of his guilty plea could or would be a *mandatory minimum* sentence of life imprisonment without the possibility parole. Appellant had no prior experience with the criminal justice system. Moreover, counsel failed to object to the court's defective colloquy which denied appellant due process of law. Furthermore, counsel failed to raise this meritorious issue on appeal.

There could be no reason for counsel's failure to inform appellant that a special circumstance of his plea would preclude his release from incarceration for the remainder of his life. Moreover, trial counsel's gross *misinformation* to appellant and his family, that he would be eligible for parole sometime after serving ten to fifteen years, deprived Petitioner of his Constitutional right to effective assistance of counsel.

Here, as in the *Persinger* case, failure of the court to abide by Standard 14-1.4, 2nd Edition, ABA Standards For Criminal Justice, resulted in appellant "suffering manifest injustice." Because such manifest injustice provided "adequate grounds for withdrawal of [appellant's] plea, counsel's failure to seek withdrawal of [such] plea was prejudicial to [appellant] . . . There was no reasonable

basis for counsel's failure to explain the consequences of the plea and, therefore, counsel was ineffective." *Commonwealth v. Persinger*, 532 Pa. at 323, 24.

As set out previously, a PCRA petition and subsequent appeal to the Superior Court were filed by counsel Rudenstein. In that appeal, counsel challenged only the defects in the colloquy pertaining to appellant's lack of understanding of the consequences of the plea. Even with that counsel was ineffective for this reason: appellant asked counsel Rudenstein, prior to the conclusion of the PCRA evidentiary hearing, to call trial counsel Dunworth to the stand and ask her why she misinformed appellant and his family that he would be eligible for parole sometime after serving ten to fifteen years and why she failed to tell him that he would never be eligible for parole, but counsel failed to call her and establish for the record her ineffectiveness. As a result, the issues raised in the instant appeal were never presented to the court for review. Pace himself did not knowingly and intelligently fail to raise these issues in any prior proceedings. Moreover, he has demonstrated the existence of extraordinary circumstances to justify his failure to raise these issues before now. Appellant Pace never gave counsel Rudenstein permission to waive these issues, nor did counsel Rudentstein inform him that if this and other issues were not raised in that PCRA petition, these issues would be waived. Because the issues in this motion have merit, counsel Rudenstein was constitutionally ineffective for failing to pursue these issues on appeal and for failing to raise trial counsel Dunworth's ineffectiveness for failing to raise these issues.

In conclusion, counsel Rudenstein was constitutionally ineffective for failing to raise prior counsel's ineffectiveness for failing to raise the issues herein, and for failing himself to raise the issues raised herein. Thus, resulting in a miscarriage of justice.

Based on the issues raised above, Petitioner is entitled to post conviction collateral relief under *42 Pa.C.S.A § 9543(a)(2)(v).* This section provides for PCRA relief when conviction has resulted from "[a] violation of the provisions of the Constitution, law or treaties of the United States which would require the granting of Federal habeas corpus relief to a state prisoner."

In the present case, appellant was deprived of his right to a jury trial guaranteed by Sixth and Fourteenth Amendments to the United States Constitution when he entered his guilty plea unknowingly, unintelligently, and involuntarily because of the defects in the colloquy, because of the illegal sentence of life imprisonment without a stated minimum sentence for parole eligibility, and because of the deficient performance of his trial and appellant counsel. Because this claim implicates Pace's rights secured by the United States Constitution, he would be entitled to federal habeas corpus relief if there is no state procedural bar to such relief.

As discussed previously, there is a potential waiver of the issues raised herein because they were not raised previously by trial counsel or appellant counsel. However, the federal courts will excuse a state procedural default based upon a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). Here the ineffective assistance of appellant's prior attorneys constitutes cause to excuse the procedural

default because appellant had a constitutional right to counsel at the stages in the proceeding where counsel's ineffectiveness resulted in alleged waiver. *Commonwealth v. Eaddy,* 419 Pa. Super. 48, 56; 614 A.2d at 1203. Appellant was prejudiced by this ineffective assistance for the reasons previously discussed. A convicted person has a right to an appeal and has the right to effective representation of counsel for purpose of the appeal. There is no effective representation when counsel through inadvertence of otherwise fails to raise an arguably meritorious issue on appeal. *Commonwealth v. Pfaff,* 477 Pa. 461, 384 A.2d 1179 (1978).

> This crucial right to direct review of all criminal convictions, guaranteed under the Pennsylvania Constitution, should not be lost due to the incompetent advice of prior counsel that no meritorious issues exist.

Eaddy, supra, 614 A.2d 1208.

When the failure to preserve an issue on direct appeal is the product of ineffective assistance of counsel, such failure does not result in waiver of the issue for the purpose of post conviction collateral relief. *Commonwealth v. McNeil,* 497 Pa. 187, 439 A.2d 664 (1982); *Commonwealth v. Felder,* 246 Pa. Super. 324, 370 A.2d 1214 (1976). In *Commonwealth v. Bable,* 248 Pa. Super. 496, 375 A.2d 350 (1977), the Superior Court concluded that counsel's ineffective assistance in failing to challenge the validity of a plea on direct appeal, when there was a legal basis for such a challenge, constituted an extraordinary circumstance entitling the appellant to withdraw his plea pursuant to the PCHA proceeding. Moreover, when each of appellant's PCRA previous attorneys is alleged to have rendered ineffective assistance of counsel, which if alleged

would have preserved the issue for review, the issue of ineffective assistance of counsel is itself properly preserved for review. *Commonwealth v. Bradley,* 332 Pa. Super. 99, 480 A.2d 1205 (1984); *Commonwealth v. Nelson,* 393 Pa. Super. 611, 574 A.2d 1107, 1109 (1990): *Commonwealth v. Perlman,* 392 Pa. Super. 1, 572 A.2d 2 (1990).

Appellant's claims, then, are cognizable under the PCRA even if they do not implicate the truth determining process. *Id.*, 614 A.2d at 1208.

CONCLUSION

WHEREFORE, for all the foregoing reasons, appellant respectfully request that this Honorable Court to reverse the PCRA Court's Order, Order a new trial or remand for further proceeding so that appellant can fully have these issues litigated.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	: Trial Court Docket nos.
	: OCTOBER TERM, 1985
Appelle	: No. 1272, 1/1
	: Philadelphia 1997
vs.	: No. 03642
	:
JOHN A. PACE	: No. ___ E.D. Alloc.
Appellant	: DKT. 1999

PROOF OF SERVICE

I hereby certify that I am this 4th day of March serving the foregoing document(s) upon the person(s) and in the manner indicated below:

Service by First Class Mail Addressed as follow:

Cathrine Marshall
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102

/s/ John A. Pace
John A. Pace, pro se
P.O. Box 244, AY-6445
Graterford, PA 19426-0244

Dated: March 4, 1999

[LOGO] DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102
686-8000

LYNNE ABRAHAM
DISTRICT ATTORNEY

March 18, 1999

Charles W. Johns, Esquire
Prothonotary, Supreme Court of Pennsylvania
Room 468 City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. John A. Pace
No. 120 E.D. Allocatur Docket 1999

Dear Mr. Johns:

Defendant has filed a petition for allowance of appeal in which he raises issues which are adequately disposed of in the Commonwealth's brief and the opinions below. The Commonwealth therefore will not file a formal answer to the petition, but encloses a copy of its Superior Court brief for the Court's convenience.

Very truly yours,

/s/ Catherine Marshall
CATHERINE MARSHALL
Chief, Appeals Unit

/jnj

cc: John A. Pace, (Pro Se)

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 120 E.D. Alloc. Dkt. 1999
Respondent,	:	
v.	:	Petition for Allowance of
JOHN A. PACE,	:	Appeal from the Order and
Petitioner	:	Memorandum Opinion of the Superior Court

ORDER

PER CURIAM:

AND NOW, this 29th day of July 1999, the Petition for Allowance of Appeal is DENIED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN
DISTRICT OF PENNSYLVANIA**

**FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 USC §2254
(eff. 10/18/96)**

John A. Pace **PETITIONER**
(Full name) (Include name under which you were convicted)

vs. **CASE NO.** 99CV6568
(supplied by the Court)

Donald Vaughn **RESPONDENT**
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE DISTRICT ATTORNEY OF THE COUNTY OF Philadelphia

and

DEC 27 1999

THE ATTORNEY GENERAL OF THE STATE OF Pennsylvania
ADDITIONAL RESPONDENT

John A. Pace — AY-6445
Name — **Prison number**

SCI-Graterford
Place of Confinement

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a

motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

INSTRUCTIONS – READ CAREFULLY

1. This petition must be legibly handwritten or typewritten and signed by the petitioner. Any false statement of a material fact in this petition or in a motion for leave to proceed in forma pauperis may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

2. Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

3. Upon receipt of a fee of $5.00, your petition will be filed if it is in proper order.

4. If you do not have the entire necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must complete the form on the pages eleven & twelve, setting forth information establishing your inability to prepay the full fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must submit an affidavit stating all your assets, and the certification on page thirteen, signed by an authorized prison official. Discharge of debt

in a bankruptcy proceeding shall not include a filing fee (or associated costs and expenses), regardless of an assertion of poverty by the debtor or the debtor's status as a prisoner.

5. Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

6. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

7. All state remedies must be exhausted before filing a claim under 28 U.S.C. 2254, however, if a prisoner files such a claim before exhausting all state remedies, the federal court has authority to deny it on its merits. A federal court, when considering a state prisoner's habeas corpus petition, must deem as correct a determination of a factual issue made by a state court, unless the prisoner rebuts the presumption by clear and convincing evidence. If a petitioner has failed to develop the factual basis of the claim in state court proceedings, a federal court shall not hold an evidentiary hearing on a habeas corpus claim unless the prisoner shows that:

(1) the claim relies on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that

could not have previously been discovered through the exercise of due diligence; and

(2) the facts underlying the claim be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the prisoner guilty.

8. There is one-year statute of limitations for filing petitions pursuant to 28 U.S.C. 2254.

9. Federal courts must dismiss claims in a second or successive petition that were presented in a prior petition.

10. Federal courts must dismiss claims in a second or successive petition that were not presented in a prior petition unless:

(1) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(2) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the petitioner guilty.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move the court of appeals for an Order authorizing the district court to consider the

petition. Petitioner's motion for such an Order must be determined by a three judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court of appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfies either (1) or (2) above.

11. Ineffectiveness of counsel during post-trial proceedings in state court shall not be grounds for relief under 28 U.S.C. 2254.

12. When the petition is fully completed, the, original and four copies must be mailed to the Clerk of the United States District Court whose address is ROOM 2609, 601 MARKET STREET, PHILADELPHIA, PENNSYLVANIA 19106.

13. Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. **(a) Name and location of court which entered the judgment of conviction under attack:** Common Pleas Court, Trial Division, Phila, Coun

   (b) Name of Prosecutor: Charles Gallaher

   (c) Prosecution conducted by District Attorney's Office of Philadelphia **County**

2. **(a) Date of Judgment of conviction:** February 13, 1999

   (b) Indictment number or numbers: _____

Term: October, 1985
Criminal Case Number: 1272

3 **Length of sentence:** Life
Sentencing Judge: David Savitt

4. **Nature of offense or offenses for which you were convicted:**
Second degree murder, and possession of Instrument of Crime.

5. **What was your plea? (check one)**

   (a) Not Guilty ( ) (b) Guilty (x)
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:_____

6. **Kind of trial: (check one)**

   (a) Jury ( ) (b) Judge only (x)

7. **Did you testify at the trial? Yes ( ) No (x)**

8. **Did you appeal from the judgment of conviction?**

   Yes (x) No ( )

9. **If you did appeal, answer the following:**

   (a) Name of court: Common Pleas, and Superior Court (PCHA petition)

   (b) Result: Denied

   (c) Date of Result: March 30, 1992

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details:

_____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of Court: Philadelphia County, PA

(2) Nature of proceeding: Post Conviction Hearing Act Petition

(3) Grounds raised: Trial counsel was ineffective for failing to provide the defendant with effective assistance of counsel, and advising the defendant to plead guilty to second degree murder, and informing him that he would be released after serving ten, twelve, or fifteen years, and that it was not the end of his life.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes (x) No ( )

(5) Result: Petition denied

(6) Date of result: March 30, 1992

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: Philadelphia County, PA

(2) Nature of proceeding: Post Conviction Relief Act Petition

(3) Grounds raised: Terms of Life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal

(2) Guilty Plea colloquy that failed to ensure Petitioner understood consequences of plea compels withdrawal of plea.

(3) Ineffective Assistance of counsel at all levels of representation resulted in denial of due process.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (x)

(5) Result: Denied

(6) Data of result: March 30, 1992

(c) As to any third petition, application or motion, give the same information:

* * *

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (x) No ( )

(2) Second petition, etc. Yes (x) No ( )

(3) Third petition, etc. Yes ( ) No ( )

* * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all you state court remedies with respect to them, However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: (1) Conviction obtained by plea of guilty which was unlawfully induced and was unknowingly and involuntarily entered.

Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner who was seventeen at

the time, was charged with murder robbery, possessing instrument of a crime generally on September 30, 1985. He was subsequently appointed attorney Moira Dunworth. After meeting with counsel Dunworth about twice, she advised the petitioner, his brother, mother and father that it was in his best interest to plead guilty to second degree murder. Petitioner asked her how much time would he have to serve, and she said ten, twelve, or fifteen years, and that it was not the end of his life. So the petitioner plead guilty on February 13, 1986 believing that he would be released after serving the above number of years. Petitioner who was seventeen (17) years old at the time, who never been incarcerated before, and had no prior convictions, would not have plead guilty had he known that he would not be eligible for parole and had to serve the remaining of his life in prison. Trial counsel Moira Dunworth has since admitted that she did not explain to the petitioner that life was life without parole, because she had a difficult time dealing with such a prospect for the him. (This information was conveyed to PCHA counsel David Rudenstein, via telephone call, and he informed the petitioner in a letter dated May 21, 1990. Exhibit D of the Supreme Court Brief. Yet, Mr. Rudenstein failed to subpoena trial counsel Dunworth to testify to exactly what she did tell petitioner regarding his plea.

B. Ground two: Denial of petitioner's right to effective assistance of counsel. Sixth Amendment Violation. Denial of Due Process. Fourteenth Amendment.

Supporting FACTS (tell your story *briefly* without citing cases or law: Trial counsel was aware that if the petitioner plead guilty to second-degree murder that he would be ineligible for parole and have to spend the remaining of his life in prison. But still trial counsel Moira

Dunworth grossly mislead the petitioner to believe that he would be released after serving ten, twelve, or fifteen years. Her actions to have the petitioner plead guilty to second-degree murder believing that he would be released after serving a number of years was not in the petitioner's best interest. Petitioner was seventeen (17) years old at the time, and had a documented history of substance abuse problems; and he was intoxicated the night of the incident. Also, trial counsel believed that a defense existed for second-degree murder, when she argued before the court on February 13, 1996, when exactly did the intent to rob Mr. Baldwin occurred. See N.T. pages. 15-16. This is according to one of the statements the petitioner gave. But still counsel advised the petitioner to plead guilty with the understanding that he would released after serving ten, twelve or fifteen years. Petitioner would not had plead guilty had he known that he would not be eligible for parole, and would remain in prison for the rest of his life.

C. Ground three: Denial of Due Process. Sixth Amendment Violation. Denial of Equal Protection of the Law. Fourteenth Amendment, and Cruel and Unusual Punishment Eight Amendment Violation.

Supporting FACTS (tell your story *briefly* without citing cases or law: Terms of Life imprisonment imposed without a discretionary minimum term for parole eligility for crimes except first and second degree arson-murder are illegal, and violates petitioner's due process rights. Equal protection of the Law Guaranteed by the Fourteenth Amendment, and violates the Eight Amendment's Ban against Cruel and Unusual Punishment Petitioner was sentenced under statute 18 Pa.C.S. 1102(b) which imposes a Life imprisonment sentence. Under 42 Pa.C.S. §9756(c) that section provides that with the exception of cases of

murder of the first degree, and certain other summary offenses §9756(c)(1)(2)(3), the court may impose a sentence to imprisonment without the right to parole. Second-degree murder is not excluded in this statute of those prohibited from being parole eligible. This statute was enacted in 1974 under the new sentencing code. This would entail that petitioners who were sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides that any person convicted in any court of this Commonwealth be sentence to a minimum and maximum limit thereof.

But a conflict exist with the above statute, because Pennsylvania Legislators in 1941 enacted 61 Pa. Stat §331.21 which prohibits the parole board from releasing on parole any person convicted of death or serving a life imprisonment. It was enacted August 6, 1941. So there appears to be an irreconcilable conflict between these two statutes, because one statute provides the petitioner with the right to parole, and the other one prohibits the petitioner from being released on paroled. As well, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment. The only time Pennsylvania Legislators specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same as provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and

providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes are irreconcilable, and the later statute should have repealed the earlier one. Thus, Petitioner was allowed to plead guilty to an illegal sentence, violating his Due Process rights under the Sixth Amendment. And, he is presently being denied Equal Protection of the law Guaranteed under the Fourteenth Amendment, as he is being held under an illegal sentence. Petitioner believes that this treatment that he is being subjected to is Cruel and Unusual, and violates his Eight Amendment rights.

* * *

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Moira Dunworth, 1422 Chestnut Street Suite 709-10, Philadelphia, Pa. 19102

(b) At arraignment and plea: Moira Dunworth, 14213 Chestnut Street Suite 709-10, Philadelphia, Pa. 19102

(c) At trial: Moira Dunworth

(d) At sentencing: Moira Dunworth

(e) On appeal: PCHA

(f) In any post-conviction proceedings: Franklin D. Green and David S. Rudenstein, 1204, Two Penn Center, Philadelphia, Pa. 19102

* * *

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (x)

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 1999 /s/ John A. Pace
Signature of Petitioner

pro se
Signature of Attorney (if any)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATEMENT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

JOHN A. PACE **PETITIONER**

vs.

DONALD VAUGHN **RESPONDENT(S)**

I, John A. Pace, **declare under the penalty of perjury, that I as the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay any or all of the required fees, costs or give security therefor at this time, I declare that because of my poverty I am unable to pay any or all of the costs of said proceeding or to give security therefor at this time and that I believe I am entitled to relief.**

1. Are you presently employed? Yes (x) No ( )

a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

Thirty-three cents a hour in the Para-Professional Law Clinic at the State Correctional Institution at Graterford

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes ( ) No (X)

b. Rent payments, interest or dividends?

Yes ( ) No (x)

c. Pensions, annuities or life insurance payments?

Yes ( ) No (x)

d. Gifts or inheritances? Yes (x) No ( )

e. Any other sources? Yes ( ) No (x)

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. $100.00 from my sister Mary 8/20/99

3. Do you own cash, or do you have money in a checking or savings account? Yes ( ) No (x)

If the answer is "yes", state the total value of the items owned.

4. Do you on any real estate, stocks, bonds, notes, automobiles, or other valuable property (exclude ordinary household furnishings and clothing)?

Yes ( ) No (x)

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. NO ONE

* * *

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on December 22, 1999 **(Date)** /s/ John A. Pace **(Petitioner's Signature)**

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $15.51 **on account to his credit at the** SCI Graterford **institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said _____ institutions: _____**

/s/ Patricia Crull
Authorized Prison Official

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE — CIVIL ACTION

V.

DONALD VAUGHN, et al. — NO. 99-6568

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

(Filed Apr. 6, 2000)

LYNNE ABRAHAM, District Attorney of Philadelphia County, by **JOHN W. GOLDSBOROUGH**, Assistant District Attorney, **THOMAS W. DOLGENOS**, Assistant District Attorney, and **DONNA G. ZUCKER**, Chief, Federal Litigation, on behalf of respondents, respectfully requests that the Petition for Writ of Habeas Corpus be denied without a hearing, and, in support thereof, states:

1. A *seriatim* answer is dispensed with for the sake of clarity.

2. On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt to the second-degree murder of Randolph Baldwin and possessing an instrument of crime ("PIC") (Nos. 1272, 1275, October term, 1985). Judge Savitt sentenced him to life imprisonment for the murder, plus a concurrent term of one to two years for PIC. Petitioner did not move to withdraw his plea or to modify the sentence, nor did he appeal.

3. Six months later, petitioner filed a *pro se* petition for relief under the Post Conviction Hearing Act (PCHA), 42 Pa.C.S. §§ 9541-9551 (1982).

4. Counsel was appointed and filed an amended petition. After a hearing on the Commonwealth's motion to dismiss, but before a decision had been rendered, counsel withdrew.

5. New counsel was appointed and filed a second amended petition, alleging trial counsel's ineffectiveness. Judge Savitt held another evidentiary hearing, and on July 23, 1991, he dismissed Pace's petition.

6. Petitioner appealed to the Superior Court of Pennsylvania, which affirmed the denial of post-conviction relief on March 30, 1992 in an unpublished memorandum. *Commonwealth v. Pace*, 421 Pa. Super. 635, 612 A.2d 535 (1992) (Table). Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which that Court denied on September 2, 1992.

7. On November 27, 1996, over ten years after his sentence became final, petitioner filed his second petition for state collateral relief, under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. Counsel was appointed and filed a petition to withdraw and a "no-merit" letter. Judge Savitt granted counsel's petition to withdraw and dismissed the petition on July 23, 1997.

8. Petitioner appealed *pro* se, and the Superior Court affirmed in an unpublished memorandum. *Commonwealth v. Pace*, 736 A.2d 12 (Pa. Super. 1998) (Table). A copy of the Superior Court's memorandum is attached as Exhibit A. The Pennsylvania Supreme Court denied allowance of appeal on July 29, 1999. *Commonwealth v. Pace*, ___ Pa. ___, 740 A.2d 1146 (1999) (Table).

9. On December 27, 1999, petitioner filed the present *pro se* Petition for Writ of Habeas Corpus.

Respondents deny that petitioner is entitled to federal habeas review or relief. His petition is time-barred and must, accordingly, be denied.)[1]

DISCUSSION

THE PETITION MUST BE DENIED AS TIME-BARRED UNDER 28 U.S.C. SECTION 2244(d).

The present petition is governed by the federal habeas corpus statute, 28 U.S.C. section 2241 *et seq.*, amended effective April 24, 1996, by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Section 2244(d) of AEDPA includes a strict one-year time limitation on the filing of new petitions:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a **properly filed** application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (emphasis added).

AEDPA's limitations period has been construed to allow prisoners a one-year "grace period" following April 24, 1996 during which to initiate their habeas actions, regardless of the date on which final review concluded, if their convictions became final before that date. *Burns v. Morton*, 134 F.2d 109, 111 (3d Cir. 1998); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996), *reversed on other grounds*, 117 S.Ct. 2059 (1997). Since petitioner's conviction became final on March 14, 1986, the "grace period" applies to his case. *Kapral v. United States*, 166 F.3d 565, 575 (3d Cir.

[1] Since the timeliness issue is dispositive, respondents have neither appended copies of petitioner's briefs and the state court opinions nor recited the issues examined therein. Should the court wish to review these issues and/or documents, respondents will provide them.

1999). Thus, petitioner had until April 23, 1997 within which to file his habeas petition.

After the grace period had begun to run, on November 27, 1996, petitioner filed his second petition for state collateral relief, under the Post [-] Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. The Superior Court determined that this petition was untimely under the 1995 amendments to the PCRA, and, accordingly, the PCRA court had no jurisdiction to entertain it. *Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A) at 6. It follows that this petition did not serve to toll AEDPA's limitations provision, for a late PCRA petition is not "properly filed" within the meaning of the federal habeas statute. 28 U.S.C. § 2244(d)(2). *See Morris v. Horn*, 187 F.3d 333, 338 (3d Cir. 1999) (state post-conviction petition dismissed on grounds of untimeliness does not toll statute of limitations under AEDPA); *Lovasz v. Vaughn*, 134 F.3d 146 (3d Cir. 1998) (a "properly filed" application for state collateral review for the purpose of AEDPA's tolling provision is one that is "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing"). *See also Webster v. Moore*, 199 F.3d 1256 (11th Cir. 2000); *Dictado v. Ducharme*, 189 F.3d 889, 891-92 (9th Cir. 1999). Thus, petitioner's second PCRA petition had no effect upon AEDPA's statute of limitations. The latest date on which petitioner could have instituted a timely habeas action remained April 23, 1997.

The present petition was filed on December 27, 1999, **over two and one-half years** after that deadline.

Petitioner satisfies none of the exceptions to the statute of limitations set forth in section 2244(d)(1)(B)-(D). No state action prevented the timely filing of this habeas

action; petitioner does not rely on a new rule of retroactively applicable constitutional law; and the factual predicates upon which his claims are based stem from events that occurred at trial and were thus discoverable in the exercise of due diligence long ago. His petition is time-barred and must be dismissed.

WHEREFORE, respondents respectfully request that the Petition for Writ of Habeas Corpus be denied without a hearing.

Respectfully submitted,

/s/ John W. Goldsborough
JOHN W. GOLDSBOROUGH
Assistant District Attorney

/s/ Thomas W. Dolgenos
THOMAS W. DOLGENOS
Assistant District Attorney
DONNA G. ZUCKER
Chief, Federal Litigation

[Exhibits Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE [AY-6445]	:	CIVIL ACTION
v.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

REPORT AND RECOMMENDATION

April 28, 2000

M. FAITH ANGELL
UNITED STATES MAGISTRATE JUDGE

Presently before this Court is a *pro se* Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254, by a state prisoner. Petitioner is currently incarcerated at State Correctional Institution ["SCI"] Graterford, Pennsylvania, where he is serving a life sentence for second-degree murder and related offenses. For the reasons which follow, it is recommended that the Petition for Writ of Habeas Corpus be denied and dismissed as untimely under 28 U.S.C. §2244(d)(1).

BACKGROUND[1]

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the second-degree murder of Randolph Baldwin and possession of an instrument of crime ["PIC"]. Judge Savitt sentenced Petitioner to life

[1] The facts in this discussion have been taken from Mr. Pace's habeas petition, and the Commonwealth's response (with exhibits).

imprisonment for the murder conviction, plus a concurrent term of one to two years imprisonment for the PIC conviction. Exhibit "A" of the Commonwealth's Response to the habeas petition (the December 3, 1998 Superior Court Opinion) at 1.

Mr. Pace did not file a motion to withdraw or to reconsider his guilty plea. Nor did he file a direct appeal.

On August 21, 1986, Petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa. C.S.A. §9541, *et seq.*[2] Counsel was appointed; he filed an amended PCHA petition. The Commonwealth filed a motion to dismiss, which was denied after a hearing. After the Commonwealth's motion was denied, PCHA counsel withdrew. Replacement counsel was appointed. *Id.* at pp.1-2.

New counsel filed a second amended petition on November 29, 1989. Included in this second petition were claims of ineffective assistance of trial counsel and trial court error in "misleading Petitioner into believing that he would be eligible for parole even though he received a mandatory life sentence." Exhibit "A" of the Commonwealth's Response (the December 3, 1998 Opinion) at p.2.

The Commonwealth moved to dismiss the second amended PCHA petition and a hearing was held. On July 23, 1991, the PCHA Court granted the Commonwealth's motion to dismiss.

[2] The Post Conviction Relief Act ["PCRA"] replaced the Post Conviction Hearing Act in 1988.

Petitioner appealed. On March 30, 1992, the Superior Court affirmed the PCHA Court's decision. Mr. Pace sought discretionary review in the Supreme Court of Pennsylvania. *Allocatur* was denied on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief, this time under the PCRA. Counsel was appointed; he subsequently filed a petition to withdraw and a "no merit" letter.

On July 23, 1997, the PCRA Court granted counsel's petition to withdraw and dismissed Mr. Pace's second collateral petition as meritless. Exhibit "A" of the Commonwealth's Response (the December 3, 1998 Opinion) at p.3.

Petitioner filed an appeal to the Superior Court. The Superior Court affirmed the denial of PCRA relief, holding that Mr. Pace's second collateral petition was untimely under 42 Pa.C.S.A. §9545(b), as amended by Act of November 17, 1995, P.L. 1118, No. 32 (Spec. Sess. No. 1), §1. According to the Superior Court, Mr. Pace's second petition for post-conviction relief, filed more than ten years after his judgment of conviction became final on March 14, 1986, was untimely and did not fit within any of the statutory exceptions set forth in 42 Pa.C.S.A. §9545(b)(1). "Therefore, the PCRA court lacked jurisdiction [over Petitioner's second petition] and its dismissal of the petition was proper." *Id.* at p.6.

Allocatur review was declined by the Pennsylvania Supreme Court on July 29, 1999. On December 27, 1999, Petitioner filed the instant habeas petition, his first. In it, he raises the following three overlapping claims:

1. Conviction obtained by plea of guilty which was unlawfully induced and was unknowingly

and involuntarily entered. Petitioner who was seventeen at the time, was charged with murder, robbery, possessing an instrument of crime generally on September 30, 1985. He was subsequently appointed attorney Moira Dunworth. After meeting with counsel Dunworth about twice, she advised the petitioner, his brother, mother and father that it was in his best interest to plead guilty to second degree murder. Petitioner asked her how much time would he have to serve, and she said ten, twelve or fifteen years, and that it was not the end of his life. So the petitioner pleaded guilty on February 13, 1986 believing that he would be released after serving the above number of years. Petitioner who was seventeen (17) years old at the time, who never been incarcerated before, and had no prior convictions, would not have pled guilty had he known that he would not be eligible for parole and had to serve the remaining of his life in prison. Trial counsel Moira Dunworth has since admitted that she did not explain to the petitioner that life was life without parole, because she has a difficult time dealing with such a prospect for the him. (This information was conveyed to PCHA Counsel David Rudenstein, via telephone call, and he informed the petitioner in a letter dated May 21, 1990. Exhibit D of the Supreme Court brief. Yet, Mr. Rudenstein failed to subpoena trial counsel Dunworth to testify to exactly what she did tell Petitioner regarding his plea.

2. Denial of petitioner's right to effective assistance of counsel. Sixth Amendment violation. Denial of due process. Fourteenth Amendment. Trial counsel was aware that if the petitioner plead guilty to second-degree murder that he would be ineligible for parole and have to spend

the remaining of his life in prison. But still trial counsel Moira Dunworth grossly mislead the petitioner to believe that he would be release after serving ten, twelve or fifteen years. Her actions to have the petitioner plead guilty to second-degree murder believing that he would be released after serving a number of years was not in the petitioner's best interest. Petitioner was seventeen (17) years old at the time, and had a documented history of substance abuse problems; and he was intoxicated the night of the incident. Also, trial counsel believed that a defense existed for second-degree murder, when she argued before the court on February 13, 1996, when exactly did the intent to rob Mr. Baldwin occurred. See N.T. pages 15-16. This is according to one of the statements the petitioner gave. But still counsel advised the petitioner to plead guilty with the understanding that he would be released after serving ten, twelve or fifteen years. Petitioner would not had pled guilty had he known that he would not be eligible for parole, and would remain in prison for the rest of his life.

3. Denial of due process. Sixth Amendment violation. Denial of equal protection of the law. Fourteenth Amendment, and Cruel and Unusual punishment, Eighth Amendment violation. Terms of life imprisonment imposed without discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal, and violate petitioner's due process rights. Equal protection of the law guaranteed by the Fourteenth Amendment. And violates the Eighth Amendment's ban against cruel and unusual punishment. Petitioner was sentenced under statute 18 Pa.C.S. 1102(b) which imposes a life imprisonment sentence. Under 42 Pa.C.S. §9756(c) that

section provides that with the exception of cases of murder of the first degree, and certain other summary offenses §9756(c)(1)(2)(3), the court may impose a sentence of imprisonment without the right to parole. Second-degree murder is not excluded in this statute of those prohibited from being parole eligible. This statute was enacted in 1974 under the new sentencing code. This would entail that petitioners who were sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides that any person convicted in any court of this Commonwealth be sentenced to a minimum and maximum limit thereof.

But a conflict exist with the above statute, because Pennsylvania legislators in 1941 enacted 61 Pa. Stat. §331.21, which prohibits the parole board from releasing on parole any person convicted of death or serving a life imprisonment. It was enacted August 6, 1941. So there appears to be an irreconcilable conflict between these two statutes, because one statute provides the petitioner with the right to parole, and the other one prohibits the petitioner from being released on parole. As well, 61 Pa.Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment. The only time Pennsylvania legislators specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violating the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without right to parole*" the same is provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes are irreconcilable, and the later statute should have repealed the earlier one. Thus, Petitioner was allowed to plead guilty to an illegal sentence, violating his Due Process rights under the Sixth Amendment. And, he is presently being denied Equal Protection of the law guaranteed under the Fourteenth Amendment, as he is being held under an illegal sentence. Petitioner believes that this treatment that he is being subjected to is Cruel and Unusual, and violates his Eighth Amendment rights. *See* Mr. Pace's habeas petition: Grounds and Supporting Facts.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 [the "AEDPA" or the "Act"], signed into law on April 24, 1996, significantly amended the laws governing habeas corpus petitions.

One of the amended provisions, 28 U.S.C. §2244(d), imposes a one-year statute of limitations on state prisoners who seek federal habeas relief. A habeas petition must be filed within one year from the date on which the petitioner's judgment of conviction becomes final. *See* 28 U.S.C. §2244(d)(1).[3]

[3] While the date on which the petitioner's conviction becomes final is typically the start date for the limitations period, the statute permits the limitation period to run from four different points in time, depending on which occurs latest. In addition to the date on which the

(Continued on following page)

In applying the one-year statute of limitations to convictions which became final before the AEDPA was signed into law, the Third Circuit has held that habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with §2244(d)(1)'s time limit. *See Burns v Morton*, 134 F.3d 109, 111 (3d Cir. 1998).

In the instant case, Mr. Pace's state conviction became final on March 14, 1986. This is the last date on which Petitioner could file a timely direct appeal to the Superior Court of Pennsylvania. Because his state court proceedings concluded before the effective date of the AEDPA, Mr. Pace would not have been barred by the statute of limitations from filing a habeas petition on or before April 23, 1997. The instant habeas petition was not filed for over two and one-half years beyond the time limit set by §2244(d)(1).

The fact that Mr. Pace filed a PCRA petition in the state system, which was pending during the one-year grace period does not toll the habeas statute of limitations. The Third Circuit has held that "a properly filed application" under the tolling provision of 28 U.S.C. §2244(d)(2) is defined as a petition submitted according to the state's

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petitioner's conviction becomes final, the start date can also run from: (1) "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action"; (2) "the date on which the constitutional right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review"; or (3) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

In the instant case, there is nothing in the pleadings before me to suggest that the start date for the statute of limitations period should be permitted to run from a point later in time than the date on which Mr. Pace's conviction became final.

procedural requirements, such as the rules governing time and place of filing. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d. Cir. 1998). Mr. Pace's PCRA petition (filed on November 27, 1996 and pending on appeal through July 29, 1999) was dismissed as untimely by the Superior Court because it was filed outside the one year statute of limitations governing collateral petitions filed under the PCRA statute. Because Petitioner's untimely PCRA petition was not properly filed and did not comply with state procedural rules, the federal habeas tolling provision does not apply, and the instant habeas petition must be dismissed as time-barred under 28 U.S.C. §2244(d)(2).

RECOMMENDATION

For the reasons stated above, it is recommended that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, be DENIED AND DISMISSED AS TIME-BARRED. It is further recommended a finding be made that there is no probable cause to issue a certificate of appealability.

BY THE COURT:

/s/ M. Faith Angell
M. FAITH ANGELL
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL ACTION
V.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

PETITIONER'S OBJECTION TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed May 18, 2000)

NOW COMES JOHN A. PACE, petitioner above-named, files the following as his Objection to Magistrate Judge's Report and Recommendation:

ARGUMENT

I. PETITIONER'S PETITION SHOULD NOT BE DISMISSED AS TIME-BARRED, AS IT DOES MEETS THE REQUIREMENTS OF 28 U.S.C. SECTION 2244 (d)(2)

Petitioner received Respondent's Response to his Writ of Habeas Corpus on April 7, 2000, and he was prepared to respond when he received the Magistrate Judge's Report and Recommendation on May 3, 2000. In this Report and Recommendation, the Magistrate Judge Faith Angell agreed with the Respondent that petitioner's habeas petition should be dismissed as being time-barred because it was filed on December 27, 1999, over two and one-half years beyond the time limit set by §2244(d)(1). This amended provision deals with a one-year statute of limitations on state prisoners who seek federal habeas relief, and it came into existence under the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA]; which was

signed into law on April 24, 1996. This provision indicates that a habeas petition must be filed within one year from the date on which the petitioner's judgment of conviction becomes final.

So the Respondent and Magistrate Judge points out that petitioner's conviction became final on March 14, 1986, but he would not have been barred by the statute of limitations from filing a habeas petition on or before April 23, 1997. But, the fact that the petitioner filed a second PCRA petition on November 27, 1996, and the Superior subsequently ruled that it was untimely, his present habeas petition was not tolled under the tolling provision of 28 U.S.C. §2244(d)(2). They both cited *Lovasz v. Vaugh* 134 F.3d 146, 168 (3d Cir. 1998), in which the Third Circuit has held that "a properly filed application" under the tolling provision of 28 U.S.C. §2244(d)(2) is define as a petition submitted according to the state's procedural requirements, such as the rules governing time and place of filing. So because petitioner's PCRA petition was dismissed as untimely by the Superior Court, and was not properly filed according to the rules governing PCRA. As well petitioner filed outside of the one year and did not comply with state procedural rules, the federal habeas tolling provision does not apply. So the instant habeas petition must be dismissed as time-barred under 28 U.S.C. §2244(d) (2).

Petitioner believes that his habeas petition should not be dismissed as untimely, and he is entitled to federal habeas review and relief as he believes that he meets the requirements set forth in 28 §2244 (d)(1)(b)(d) and (2).

The present petition before this court is governed by the federal habeas corpus statute, 28 U.S.C. section 2241

et seq., and true it has a provision within it that places time limitations on state prisoners to file a habeas petition. §2244 (d)(1). And, in order to trigger the tolling provision, the petitioner must meet one of the exceptions enumerated in §2244 (d)(1)(b)-(d)(2):

> (1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims

> presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Thus allowing this provision to be subject to equitable tolling. In *Miller v. New Jersey Department of Correction*, 144 F.3d 616, 618 (3d Cir. 1998), the Third Circuit Court held that the one-year limitation period in 2244 (d)(1) is a statue of limitations, not a jurisdictional bar, and thus subject to equitable tolling or consideration in extraordinary circumstances. Thus, consideration can be given if the petitioner was prevented from asserting his right to file "in an extraordinary way," *Osniver v. Levin Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir.1994). However, the petitioner must show that he exercised reasonable diligence in investigating and bringing the claims. *New Castle County v. Halliburton NUS Corp*, 111 F.3d 1116, at 1126 (3d Cir. 1997).

Petitioner believes that he is entitled to federal habeas review and relief, as it was state actions that prevented him from filing a timely Post Conviction Relief petition (PCRA) to exhaust his state remedies in accordance with state procedures. Which prevented him from filing his present federal habeas corpus petition on or before April 23, 1997.

In the instant case, petitioner was prepared to file a second Post Collateral Relief petition (PCRA) in the state courts immediately after the Pennsylvania Supreme Court

denied his Allocatur on September 2, 1992, to present his unexhausted and Constitutional claims. But, petitioner was unable to do so because he did not have his legal documents. As a result of the Camphill disturbance on October 25th and 26th of 1989, and the subsequent conduct of the prison officials deliberately destroying all inmates personal possessions, including all legal documents, it impaired petitioner's ability to proceed with filing his second PCRA petition. Petitioner tried to obtain his legal documents by writing to the Clerk of Courts, then Peter Truman. In petitioner's letter to the Clerk of Courts date stamped February 14, 1990, he is clearly explaining to the clerk that all of his legal documents were destroyed after the disturbance at Camphill 1989. See: Exhibit ***A*** enclosed. Still petitioner was unsuccessful in obtaining his legal documents. Petitioner was also a plaintiff in a class action suit filed against the prison officials. See: *Camphill litigation*.

So petitioner contends that his delay in filing his second PCRA petition was the result of government interference, which should have satisfied the state post conviction procedural requirements enumerated in *42 Pa.C.S.A. §9545(b)(1)(i).* So petitioner's petition should not have been dismissed as untimely. Furthermore, because petitioner didn't believe that the amended PCRA legislation was retroactive; specifically section *§9545(b)(1),* he did not feel compelled to immediately file his PCRA petition, especially since he was unprepared to do so, because of the above reasons of not having his legal documents.

Moreover, petitioner was not alone in his lack of knowledge of the amended PCRA legislation retroactive implications, as the PCRA court dismissed the petitioner's petition for what it called a lack of merit, and not for it

being untimely. Please note, Pennsylvania Supreme Court had not rendered a decision on the new PCRA legislation, and *Commonwealth v. Alcorn*, ___ Pa. ___ Super. 703 A.2d 1054 (1997) decision was not rendered by the Superior Court at that time. The decision in *Alcorn* was not rendered until over one year after the petitioner filed his second PCRA petition, and it was then that the Commonwealth asserted this argument in a *letter brief* to the Superior Court that petitioner's PCRA petition was untimely and the PCRA court should not have entertained it.

In *Alcorn*, that court held that in 1995, the General Assembly made modifications to the PCRA to indicate time limits for the litigation of PCRA petitions. More specifically, the amendments bars any petition for post-conviction relief, including a second or subsequent petitions not filed within one year of the date the defendant's judgment of sentence became final. So, the Superior Court subsequently denied the petitioner's appeal as being untimely filed. Petitioner filed a timely application for reargument, and he stated his claim of government interference. See: Application of Reargument enclosed Exhibit ***B***. This application was denied, and petitioner filed a timely allowance of appeal to the Pennsylvania Supreme Court.

Thus, petitioner should have been allowed to present his claims in the state court under *42 Pa.C.S.A. §9545 (b)(1)(i),* which states: "The failure to raise the claim previously was the result of interference by governmental officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States."

Petitioner believes that he has demonstrated that he was prevented from asserting his right to file in an extraordinary way, and that he exercised reasonable diligence in investigating and bring his claims, so he should be entitled to federal review and relief. So, petitioner's first habeas petition should be tolled under provision *§2244 (d)(2).* In our federal system, "the states should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." Citing *Coleman v. Thompson,* 501 U.S. 722, 731, 111 S.Ct. 2546 (1991). Such respect for the states has given rise to the well – established rule that a federal court should not find a states prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims." *Touson v. Beyer,* 987 F. 2d 984, 987 (3rd Cir. 1993). Here petitioner's second PCRA petition was properly filed on November 27, 1986, as it was government interference that was the cause for his delay in filing. Petitioner presented this claim to the state courts after he learned that the Superior Court would be adopting the *Alcorn* decision, but this court denied his application for reargument. See: Exhibit ***C.***

Lastly, petitioner pray that this court will consider that when he filed his second PCRA petition, no state or federal case law existed to provide him with proper notice that he would be time-barred from federal review if he attempted to exhaust his state remedies through a second PCRA petition. When petitioner initiated his second PCRA petition on November 27, 1996, the law governing PCRA was *Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988), and *Commonwealth v. Blackwell,* 384 Pa. Super. 251, 558 A.2d 107 (1989). These courts ruled that a second

PCRA petition is permitted if the petitioner is able to meet one of the enumerated requirements. Because the courts had not reached a decision in *Alcorn* yet, petitioner's petition was governed by *Lawson/Blackwell,* supra., which was the law. Under *Lawson/Blackwell,* petitioners were allowed to bring a second PCRA petitions if they can prove that a miscarriage of justice had occurred that no civilized society could tolerate. As stated above, clearly the PCRA court was guided by these same standards, as this court dismissed the petitioner's petition for what it called a lack of merit, and not because the petition was untimely. Over a year later, and the petitioner was appealing that court's decision, the *Alcorn* ruling was rendered, and the Commonwealth asserted the argument that his second PCRA petition was untimely and should not have been entertained.

How was petitioner expected to know how the new legislation would apply, when learned scholars in the law was not clear on this new 1995 PCRA legislation. In *Lambert v. Blackwell,* 134 F.3d. 506, at 524 (3rd. cir. 1997), that court too was in limbo, as the Third Circuit Court stated: "We note to date, no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision." This court was not confident that petitioners would not be allowed to proceed in the state courts to exhaust their issues without being time barred. This opinion was shared by numerous other Third Circuit Courts, notably *Banks v. Horn,* 126 F.3d.206 (3d. cir. 1997), which found that, even though petitioner had already filed one PCRA petition and that the one-year statute of limitations for filing yet another PCRA petition had run out,

there was a chance that the state courts might nevertheless entertain a second PCRA petition filed by petitioner and address petitioner's three unexhausted claims on the merits. In that case, the Magistrate returned it back to the state court, because there was no absolute statement by the Pennsylvania Supreme Court that an untimely PCRA petition would not be permitted.

It was not until *Commonwealth v. Peterkin*, 722 A2d. 638 (PA. 1998), that the Pennsylvania Supreme Court decided on this matter, and made it clear by denying a PCRA petition as untimely for failing to comply with the one-year statute of limitations. So again, how was a layman *pro se* expected to have a proper interpretation of this 1995 amended legislation without being given fair notice.

Applying the new time limitation retroactively to the instant case would mean that on the effective date of the PCRA, which was January 16, 1996, without prior notice or opportunity to act, the legislature stripped appellant's rights and fair expectations as of February 13, 1996. The problem with the instant PCRA legislation is that, it does not give anyone fair notice. Fair notice certainly implicates due process concerns, and because of a lack of fair notice, it will deprive appellant and others who are similarly situated, due process of law, as well as access to courts. In *Miller v. Florida*, 482 U.S. 423, 107 S.CT 2446, 96 L.ED. 2d. 351 (1987), the United States Supreme Court stated that a law is retrospective if it changes the legal consequences of acts completed before its effective date and that such a law was violative of due process. In the instant case, the new PCRA legislation clearly attaches new legal consequences to events that were already completed before its enactment. Since final judgment was

rendered in appellant's case on March 13, 1986, an event already completed, the new legal consequences is that appellant is now time barred from filing *any* PCRA petition.

Petitioner request that this Honorable Court will grant him federal habeas review and relief.

II. In Any Event, The Petitioner's Petition Provides Basis For Federal Habeas Relief

STATEMENT OF THE CASE

On September 30, 1985, Petitioner who was seventeen years old was arrested and charged with Murder, Robbery, and Possessing an Instrument of Crime (PIC) in the death of Mr. Randolph Baldwin.

On February 13, 1986, petitioner entered a plea of guilty in the Court of Common Pleas of Philadelphia County to the following charges: at 1985 October term 1272 Murder in the second-degree, and at 1985 October 1275 ("PIC"). On this same day, Petitioner was sentenced by Judge David Savitt to life imprisonment for the murder and a concurrent term of one to two years for "PIC".

PROCEDURAL HISTORY

Petitioner did not file a motion to withdraw his plea, or appeal his judgment of sentence. On August 27, 1986, six months later, petitioner filed a *pro se* petition for relief under the Post Conviction Hearing Act 42 Pa. C.S. §§ 9541-9551 (1982) (PCHA), and he was appointed counsel Franklin D. Green, who filed an amend petition

arguing trial counsel ineffectiveness and raised the following claims:

1. Trial counsel was ineffective for failing to seek a suppression of the defendant's statement or confession after he was arrested.

2. Trial counsel was ineffective for failing to explain to the petitioner the effect, full effect of pleading guilty to second degree murder.

A hearing on the Commonwealth's motion to dismiss was held, and an evidentiary hearing was ordered on July 25th, 1988, to take place on November 15, 1988. Counsel Green then withdrew because of personal reasons. So new counsel David Rudenstein was appointed and filed a second amended petition. He filed the following claims:

1. Trial counsel was ineffective for failing to properly present reasons in support of her pre-trial application to this matter to family court.

2. Trial was ineffective for failing to insist that pre-trial motions to suppress defendant's out-of-court statements be held prior to the time any guilty plea was entered.

3. Trial counsel was ineffective for failing to fully explain the ramification of the guilty plea to defendant.

4. The defendant received ineffective assistance of counsel in that defense counsel should have advised defendant not to plead guilty to second degree murder.

An evidentiary hearing was held on March 26, 1991 before Judge James McCrudden, and the petitioner testified that trial counsel advised him to plead guilty to

second degree murder, and that he would only serve 10, 12, or 15 years, but that it was not the end of his life. (N/T, 3/26/91, p. 10). However, on July 23, 1991, petitioner's petition was dismissed and petitioner filed a timely appeal to the Superior Court of Pennsylvania, which affirmed the denial of post-conviction relief on March 30, 1992. Petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court, which was denied September 2, 1992.

On November 27, 1996, after trying to obtain his legal documents that were destroyed in the Camphill disturbance, the petitioner filed his second state collateral relief petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §9541-9546. Petitioner asserted the following claims:

1. Terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

2. Guilty plea colloquy that failed to ensure petitioner understood consequences of plea compels withdrawal of plea.

3. Ineffective assistance of counsel at all levels of representation resulted in denial of due process.

Counsel David Belmont was appointed to represent the petitioner, and he filed a Finley "no-merit" letter to withdraw as counsel. Judge Savitt granted counsel's petition to withdraw and dismissed the petition on July 23, 1997. Petitioner appealed *pro se*, and the Superior Court affirmed the dismissal. Petitioner filed allowance of

appeal to the Pennsylvania Supreme Court, and it was denied on July 29, 1999.

Federal Habeas Petition:

On December 27, 1999, petitioner filed the present *pro se* Petition for Writ of Habeas Corpus. And, raised the following:

a. Petitioner's conviction was obtained by a plea of guilty which was unlawfully induced and was unknowingly and involuntarily entered because he was denied the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution because his attorney advised him to plead guilty to second degree murder when his attorney told him that he would be released after serving 10, 12, or 15 years if he pled guilty to second degree murder which was incorrect because the mandatory sentence was life without parole; and.

b. Petitioner has been denied due process of law, equal protection of the law, being subjected to cruel and unusual punishment in violation of the Sixth, Fourteenth, Eighth Amendment to the Constitution of the United States, terms of life imprisonment imposed without a discretionary minimum term for parole eligibility for crimes except first and second degree arson-murder are illegal.

Standard of Review

A petitioner is only entitled to federal habeas relief if he meets the requirements of Title 28 U.S.C. §2254(d), which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d) (1) and (2).

Discussion

Petitioner first argues that trial counsel was ineffective for failing to inform him that his plea to second degree murder carried a mandatory life imprisonment without the possibility of parole, and for misleading him to believe that he would released after serving 10, 12, or 15 years. [T]he legal standards that apply to claims that an attorney provided constitutionally inadequate legal representation are well-known. To obtain relief, a habeas petitioner must demonstrate "that counsel's performance fell below an

objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). The two-part test articulated in *strickland* applies to claims of ineffective assistance of counsel in the context of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985), Thus, petitioner is required to established that the advice furnished by counsel was objectively unreasonable and that there is a reasonable probability that his plea decision would have been different had he received accurate information.

In *Meyers v. Gillis*, 93 F.3d 1147, at 1153 (3d Cir. 1996) the Third Circuit Court of Appeals noted that a guilty plea is not involuntary or unintelligent simply because the defendant is not provided with information concerning parole eligibility. However, that Court distinguished between situations in which no parole eligibility information is imparted to a defendant and those in which he is given grossly erroneous advice as to parole eligibility. In the later latter situation, a defendant may be entitled to habeas relief if he can demonstrate that he would have gone to trial if he had received accurate advice from counsel:

> ("several federal appellate courts have suggested or held that, where parole eligility information is provided to a defendant by the state or the defendant's attorney and that information is grossly erroneous, a defendant may be entitled to habeas relief where he can show that he would not have pleaded guilty had accurate information been provided. *See, e.g., Sparks v. Sowders*, 852 F. 2d 882, 885 (6th Cir. 1988). ("This court has decided that erroneous misadvice concerning parole eligibility can amount to ineffective assistance of counsel.") *Meyers v. Gillis*, 142 F.3d 644 (3d Cir. 1998) ("This issue has also been addressed by other circuits which have held or noted that misinformation concerning parole eligibility can be ineffective assistance of counsel. . . . We now hold that gross misadvice concerning parole eligibility can amount to ineffective assistance of counsel."); *Czere v. Butler*, 833 F.2d 59, 63 n.6 (5th Cir. 1987) ("other courts have recognized a distinction between failure to inform and giving misinformation" regarding parole eligibility); *O'Tuel v. Osborne*, 706 F.2d 498, 500-01 (4th Cir. 1983); *Cepulonis v. ponte*, 699 F. 2d 573, 577 (1st Cir. 1983) (defendant need not be informed of the details of parole eligibility but "misinformation may be more vulnerable to constitutional challenge than the mere lack of information"); *Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) [T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which the defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.")

93 F.2d at 1153-54; *See also Hawkins v. Murray*, 798 F.Supp. 330, 335 (E.D. Va. 1992) (Equally offensive is the suggestion that a lawyer meets any reasonable standards when he or she fails to advise a defendant that the defendant's plea will result in parole ineligibility and a lengthy period of incarceration")

In this instant case, on February 13, 1986, prior to actually pleading guilty before Judge Savitt, the petitioner was approached by trial counsel Moira Dunworth and he

was advised by her to plead guilty to second-degree murder. Petitioner immediately asked her how much time would he serve, and she informed him that he would only do 10, 12, or 15 years, *but that it was not the end of his life.* Because of the petitioner's age, his parents and brother was approached and advised of this same information, and they advised tell him to plead guilty. Petitioner who had no prior experience of being incarcerated or coming through the legal system, was never told that he would receive a life sentence or that by pleading guilty to second degree murder that he would be ineligible to be released for the rest of his life. Petitioner who was seventeen at the time, would not have plead guilty to spend the remaining of his life in prison had he been told that he would be ineligible for parole. So petitioner appealed immediately after learning that counsel information was grossly inaccurate.

Though trial Judge David Savitt colloquyed the petitioner on February 13, 1986, in regards to the voluntariness of his plea, the petitioner still had an improper understanding of what life imprisonment meant. Petitioner's only understanding of what life imprisonment meant was the information that his trial counsel advised him on prior to his pleading guilty on February 13, 1986. Petitioner testified to exactly what he was told about pleading guilty to second degree murder at an evidentiary hearing held on March 26, 1991, before Judge James McCrudden. He testified to the following:

> "She told me that I would receive ten (10), twelve (12) or fifteen (15) years. That's now much time I would do. It is not like it's the rest of my life. This is what she told she told me." (N/T, 3/26/1991, p.10).

There is nothing in the record to refute the Petitioner's claim that trial counsel did inform him that he would be released after serving 10, 12, or 15 years. However, trial counsel did admit to petitioner's PCRA counsel David Rudenstein, via a telephone call, that she *"did not explain Life was Life without parole simply because she had a very difficult emotional time dealing with such a prospect for the petitioner and his family."* See: Attorney Rudenstein's letter May 21, 1990 as Exhibit ***D***. Attorney Rudenstein had this information available when the evidentiary hearing took place on March 26, 1991, but he failed to call trial counsel as a witness to testify to exactly what she did tell the petitioner in regards to his pleading guilty to second degree murder, and his being released.

After the evidentiary hearing, Judge McCrudden dismissed the petitioner's first PCHA petition for the following reasons:

> "In no less than three (3) instances, defendant was advised that the mandatory sentence for second degree murder is life imprisonment. In each instance, defendant, who stated before this court that he read, writes and understands the English language, advised the sentencing court that he fully understood the impact of the guilty plea and that the plea was voluntary. As the courts of this commonwealth have held, claims directly refuted by the trial court record do not warrant post conviction relief. *Commonwealth v. Cappelli*, 340 Pa. Super. 9, 489 A.2d 813 (1985). See: Court Opinion August 22, 1991.

Please note, the record does not clearly refute the petitioner's claim that he was informed by trial counsel that 'he would only do 10, 12, or 15 years if he plead guilty to second-degree murder, and that it was not the end of his

life.' Rather, the petitioner's exhibit ***D*** contends to confirm his claim that trial counsel advised him on some information regarding parole and his being released. Generally, a habeas petitioner's mistaken belief regarding parole eligibility, alone is insufficient to set aside a guilty plea. *Spinelli v. Collins*, 992 F.2d 559, 562 (5th Cir. 1993). Moreover, a criminal defendant does not need to be advised of "the details of his parole eligibility, including the possibility of being ineligible for parole." *King v. Dutton*, 17 F.3d 151, 154 (6th Cir.), cert. denied, 512 U.S. 1222 (1994). Nonetheless, *information regarding parole provided to a criminal defendant by defense counsel must be accurate. Meyers*, 142 F.3d at 667 n.2. According, a counsel's "gross misadvice" regarding parole eligibility can amount to ineffective assistance of counsel. *Sparks v. Sowders*, supra.

The petitioner who was seventeen, did not know what life imprisonment meant, and when he asked, he was advised that he would only do 10, 12, or 15 years, so he pled guilty under the pretense that he would be released after serving 10 to 15 years. In a Third Circuit Court case involving a state court conviction, the U.S. Court of Appeals held that a guilty plea is only entered voluntarily after proper advice and with *full understanding of the consequences* thereof. *United States Ex Rel Crosby v. Brierly*, 404 F.2d 790 (1968).

Here, petitioner's Sixth Amendment right to effective assistance of counsel was violated because his counsel advice caused him to believe that he would be eligible for parole by pleading guilty to second-degree murder, even though the offense mandated a life sentence without parole. Petitioner relied on this advice from his counsel, but had he known that he would be ineligible for parole, or

that he would spend the remainder of his life in prison, he would not have pled guilty. So when the petitioner asked counsel how much time he would serve, the advice offered by trial counsel was inaccurate and thus was not objectively reasonable within the meaning of *Strickland*. As well, it was not in the petitioner best interest.

The petitioner's decision would have been different if he had been given accurate legal advice as to parole eligibility. *Hill*, 474 U.S. at 60. In considering this issue, petitioner ask the court to be mindful of the fact that "*Strickland v. Washington* does not require certainty or even a preponderance of the evidence that the outcome would have been different with effective assistance of counsel; it requires only a 'reasonable probability' that that is the case." *United States v. Day*, 969 F.2d 39, 45 n.8 (3d Cir. 1992).

The petitioner who was seventeen years old at the time, would not had agreed to spend the remainder of his life in prison if he had known that a guilty plea to second-degree murder mandated such a sentence. Obvious counsel believed that a defense to first and second degree murder existed, as she stated to Judge Savitt the following:

> "Mr. Baldwin apparently said something to my client, such as 'what are you doing?', or something to that effect. My client said, 'What do you mean?'. He said, 'I know what you are up to'; that is Mr. Baldwin.
>
> Mr. Baldwin according to the statement, reached out my client. My client had a blackjack in his pocket.

> He hit Mr. Baldwin with the blackjack, he did not rob Mr. Baldwin. There is certainly an intimation that my client may have contemplated that, at least according to the statements. There were two statements.
>
> My client walked away from Mr. Baldwin and, apparently, there was an officer who was in a patrol car, Officer Little, who witnessed the latter part of the incident.
>
> I think it's significant, Your Honor, that the officer indicated in the statement that he gave subsequent to this, to the arrest of my client for murder, that it looked to him like a fist fight was ensuing, so it's a very ticklish question as to when the intent to rob occurred. [Trial Transcripts at pages 15 and 16].

Yet, counsel Dunworth advised the petitioner to plead guilty to second degree murder. Information was also available that the petitioner was under the influence of alcohol and drugs at the time he committed the offense. Trial Transcripts at page 12. So clearly there were defenses that the petitioner could have pursued, rather than plead guilty to second degree murder to spend the remainder of his life in prison. Petitioner was clearly prejudice by her counsel actions, and would not have plead guilty but for counsel grossly misleading advise.

* * *

Secondly, the petitioner argues that "*terms of life imprisonment imposed without a discretionary minimum term for parole eligibility of crimes except first and second degree arson murder are illegal.*" Thus, in violation of petitioner's Sixth, Fourteenth, and Eighth Amendment

rights. The petitioner contends that he is presently being held under an illegal sentence.

The Honorable Judge Savitt sentenced the petitioner to a term of life imprisonment for second degree murder without an established minimum sentence for parole eligibility. Assuming for the sake of this argument only, that the court properly sentenced the petitioner to life term, in failing to set a minimum sentence the court violated his statutory right to parole eligibility as established by 42 Pa.C.S., §9756(c). That section provides:

> (c) Prohibition of Parole. – Except in the case of murder of the firdt degree, the court may impose a sentence to imprisonment without the right to parole only when:
>
> (1) a summary offense is charged;
>
> (2) sentence is imposed for nonpayment of fines or costs, or, both, in which case the sentence shall specify the number of days to be served; and
>
> (3) the maximum term or terms of imprisonment imposed on one or more indictments to run consecutively or concurrently total less than 30 days.

Because the petitioner was not convicted of first degree murder, and none of the other exceptions within 9756(c) applies in his case, he was entitled under the plain statutory language to have the court set a minimum sentence which, under §9756(c), could not exceed one-half the maximum, thus defining a parole eligibility date. 1 Pa.C.S. §1924. ("Exceptions expressed in statute shall be construed to exclude all others.") As held in *Commonwealth v. Bell,* 512 Pa. 334, 516 A.2d 1172, 1175 (1986),

applying 1 Pa.C.S. §1921(b), when statutory language is clear, the judiciary must read the provisions of a sentencing statute in accordance with plain meaning and usage.

Although §9756(c) is free of ambiguity in and of itself, it must be read in connection with another statute which, on its face, prohibits the Pennsylvania Board of Probation and Parole from exercising its power to release on parole any person serving life imprisonment. That statute, 61 Pa. Stat. section 331.21 provides that:

> The board is hereby authorized to released on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment. . . .

Another statute, 61 Pa. Stat. §331.17, bestows on the parole board the "exclusive power to parole," and does not exclude cases in which the sentence imposed was life imprisonment.

Sections 9756(c) of title 42 and 331.21 of Purdon's Title 61, although codified in different title of the Pennsylvania penal law, are statutes "*in pari materia*" because they "relate to the same persons or things or to the same class of persons or things." 1 Pa.C.S. §1932(a). Such statutes "shall be construed together, if possible, under one statute." *Id.* at (b). Indeed, under this definition all of the statutes within Pennsylvania's Crimes Code which pertain to sentences of life imprisonment are "*in pari materia*" with one another and with the relevant sections of Title 61, and should be read together, in a manner that, "if possible. [gives] effect to all [their] provisions." 1 Pa.C.S. §1921(a).

At first reading 42 Pa.C.S. §9756(c) and 61 Pa.Stat. 331.21 might appear to be in irreconcilable conflict. The former prohibits the court from sentencing a defendant convicted of a degree of murder other than first degree, some of whom, like the petitioner have been convicted of second degree murder and face life sentences, to a non parole eligible sentence; the latter prohibits the parole board from releasing prisoners serving life terms. Clearly there is a problem here, because the petitioner who was sentenced under 18 Pa.C.S. 1102(b) is entitled to the benefits of 19 P.S. Section 1057, which provides any people convicted in any court of this Commonwealth be sentence to a minimum and maximum limit thereof. The only statute which Pennsylvania legislator specified that the terms of life imprisonment for murder shall be without parole, was for certain aggravated types. For example, 18 Pa.C.S. §3301(b) provides that "[a] person convicted of violation the provision of subsection (a)(2) [first degree murder by person committing arson] shall be sentenced to death or life imprisonment *without the right to parole*" the same is provided for arson-murder in the second degree.

So, the Honorable Judge Savitt violated the petitioner's statutory right in failing to set a minimum sentence, and providing the petitioner with a parole eligibility date as established by 42 Pa.C.S. §9756(c). The solution is that the two statutes must be recognized as irreconcilable, and the latter statute should repeal the earlier one. Presently, petitioner's Sixth, Fourteenth and Eighth Amendment rights are being violated.

Petitioner can not stress the importance of a hearing on this Writ of Habeas Corpus petition, where, he has been egregiously deprived of his fundamental right to Due Process and Equal Protection of law. Petitioner believes

that fundamental miscarriage of justice has occurred in this case, and he would really like the opportunity to have this court fully review his claims, and allow him to further present them to this court.

CONCLUSION

Wherefore, the petitioner pray that this court will grant him federal habeas review and relief, and grant the petitioner an evidentiary hearing. What is more, there is a probable cause to issue a certificate of appealability. Lastly, the petitioner request that if this court grant his review, that he be allowed to amend this petition.

Respectfully submitted,

/s/ John A. Pace
John A. Pace, AY6445
P.O. Box 244
Graterford, Pa. 19426

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE **CIVIL ACTION**

V.

NO. 99-6568

DONALD VAUGHN, et al.

RESPONSE TO PETITIONER'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed May 22, 2000)

LYNNE ABRAHAM, District Attorney of Philadelphia County, by **JOHN W. GOLDSBOROUGH,** Assistant District Attorney, and **THOMAS W. DOLGENOS**, Chief, Federal Litigation, on behalf of respondents, respectfully requests that petitioner's objections to the Magistrate Judge's Report and Recommendation be overruled and his petition denied and, in support of this request, states:

In his twenty-seven pages of objections, petitioner, a convicted murderer, makes arguments that were not articulated to the Magistrate Judge.[1] Preliminarily, respondents note that pages 11-27 of petitioner's pleading do not voice objections to the Report and Recommendation but reiterate claims which were made in the petition. The actual objections are contained in the first ten pages only.

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[1] Petitioner first asserted these arguments in his late "Reply to Respondent's Response," which respondents received on May 9, 2000. It bears a certification of service hand-dated May 4, 2000. However, the Magistrate Judge's Report and Recommendation was dated May 1, 2000. Petitioner's late reply was substantially identical to his present objections.

In his objections, petitioner states for the first time that the one-year statute of limitations set forth in 28 U.S.C. § 2244(d), with which he failed to comply, should be deemed equitably tolled in his case. He attempts to set forth several reasons this Court should reject the application of the habeas time bar, but none of these provides a basis for rejecting it.

Outside the context of equitable tolling, petitioner first attempts to demonstrate that his deadline was later than the usual grace period because the state prevented him from filing his habeas petition. He claims, under 28 U.S.C. section 2244(d)(1)(B), that the government created an impediment to his filing, and that therefore the one-year period of limitation for filing his habeas petition did not start to run until that obstacle was removed. Objections at 3-5. Petitioner specifies that his "legal documents" were taken from him as a result of a prison disturbance in October of 1989, and that this prevented him from filing his second PCRA petition until he did. That, in turn, he says, somehow prevented him from filing the present habeas petition in a timely fashion. He neither states when he received his "legal documents," i.e., when the impediment was removed, nor ex-plains why he was unable to file a habeas petition at the same time he filed his second PCRA petition. When this claim is examined more closely, it becomes clear that there is no possible way the deprivation he alleges, even if true, could have prevented him from filing his habeas petition by the date required, April 23, 1997.

Despite claiming he was prevented from doing so until after 1996, petitioner *did* file a petition for PCRA relief with the state courts in 1986, well *before* the alleged 1989 prison riot occurred. Report and Recommendation at 2.

Counsel filed an amended version of this PCRA petition in November of 1989, immediately *after* the prison disturbance to which petitioner refers. Petitioner presumably received a copy of all court documents relating to this PCRA action *after* the 1989 prison riot; therefore, these documents could not have been taken away from him as a result of that earlier disturbance.

In any event, petitioner could have received these documents from counsel. Petitioner was represented by an attorney through his appeal to the Superior Court of the denial of PCRA relief, as a result of which the denial of PCRA relief was affirmed in 1992. He does not explain why he did not obtain a copy of any missing "legal documents," whatever that may mean, from his attorney during those three years after the prison disturbance.

The 1989 prison event clearly had no effect upon petitioner's assertion of claims in the round of PCRA review he began in 1986.

The record demonstrates that, after he received all the opinions and briefs filed during his first PCRA round (i.e., after the state supreme court affirmed the denial of PCRA relief in 1992), petitioner did nothing for four years, until November of 1996, a date some seven months after the one-year "grace period" had begun to run after AEDPA was enacted on April 24, 1996. *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998). He fails to ex-plain why he did not file a federal habeas petition during these four years. He only asserts that he did not file his second PCRA claim during that time because he lacked his "legal documents," which, as explained above, does not make sense. Petitioner claims that immediately after the state supreme court denied his first PCRA petition in 1992, he "was prepared to file a

second" but "was unable to do so because he did not have his legal documents." Objection at 5. However, for some reason, he *was* able to do so in 1996, and he does not explain what changed to allow him to file in 1996, or how that precluded him from filing a habeas petition by April 23, 1997.

In November of 1996, petitioner chose to file a second state PCRA request. At that time, it is apparent that petitioner felt he had a sufficiently complete collection of "legal documents" to tender such a filing. Thus, on the same date, he could instead have filed a habeas petition – and it would have been deemed timely under the "grace period" provision of *Burns v. Morton,* 134 F.3d 109, 111 (3d Cir. 1998). He could even have filed both a PCRA and a habeas petition at the same time. Rather than taking these safer courses of action, however, he chose to file *only* a second state request for collateral relief, a request he had no right to file under the plain language of the PCRA. Petitioner nowhere asserts that his 1996 choice of whether to file a first habeas petition or a second PCRA petition, or both, had anything to do with the "impediment" he asserts was created in 1989. He just chose incorrectly. But that is not a valid reason for resetting AEDPA's deadline.

Petitioner simply does not qualify for an extended, post-grace-period deadline under section 2244(d)(1)(B) because there was no governmental impediment that prevented him from filing a habeas petition during the "grace period" – which he missed by over two years.

Petitioner further claims statutory tolling is warranted because "the petitioner *didn't believe* that the amended PCRA legislation was retroactive." Objection at 5 (emphasis added). Petitioner's subjective beliefs do not

affect the deadline, and he does not cite authority to the contrary.

Petitioner also states that the state courts should have held that his claim of governmental interference permitted him to file a (very) late PCRA petition under 42 Pa.C.S. § 9545(b)(1)(i). However, he chose not to include that excuse in his second PCRA petition. By petitioner's own statement, he only included it in his application for reargument. Thus, the state courts had no opportunity to rule on this claim, and it is defaulted. Petitioner's attempt to have a federal court re-set his state PCRA filing deadline, which the state courts could not now do, is inappropriate in a federal habeas action.

In his primary objection, petitioner next claims the statute of limitations should be tolled equitably for two reasons: first, he claims that he was in some extraordinary way prevented from asserting his rights, pointing again to the 1989 prison disturbance; second, he argues that he could not have known that the plain-language PCRA time-bar would be applied to him. This bid for equitable tolling falls far short of the mark.

The Third Circuit has recently emphasized that statutes of limitations are subject to equitable tolling only in the narrowest of circumstances. *See Seitzinger v. Reading Hosp. and Medical Ctr.,* 165 F.3d 236, 239-40 (3d Cir. 1999) (courts must be sparing in their use of equitable tolling; "'procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants'"), *citing Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 152 (1984).

Equitable tolling may be appropriate where a petitioner has diligently pursued his federal claims and (1) the respondent has actively misled the petitioner regarding the filing deadline; (2) the petitioner has in some extraordinary way been prevented from asserting his or her rights; or (3) the petitioner has timely filed but in the wrong forum or in a defective way. *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir. 1999); *Miller v. N. J. State Dept. of Corrections,* 145 F.3d 616, 618-19 (3d Cir. 1998); *New Castle County v. Halliburton NUS Corp.,* 111 F.3d 1116, 1125-26 (3d Cir. 1997); *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1387 (3d Cir. 1994); *see Irwin v. Dept. of Veterans' Affairs,* 498 U.S. 89, 96 (1990). In contrast, courts will not toll a limitations statute where the tardy filing resulted from a lack of due diligence by the filing party or a mistake or lack of knowledge of the applicable law. *See Irwin, supra; Miller,* 145 F.3d at 619 ("mere excusable neglect is not sufficient"); *New Castle County,* 111 F.3d at 1126; *Wakefield v. Railroad Retirement Bd.,* 131 F.3d 967, 970 (11th Cir. 1997); *Gatewood v. Railroad Retirement Bd.,* 88 F.3d 886, 890 (10th Cir. 1996).

Because petitioner was not reasonably diligent in pursuing his claims, equitable tolling is not warranted.

First, it is important to emphasize that the AEDPA time bar here rests on a question of state law – the applicability of the PCRA filing deadline. Petitioner's tolling argument is simply an attempt to evade the decisions of the state court, which are deserving of deference and respect in a habeas proceeding. Furthermore, the state courts' application of state law could not be more straightforward and predictable in this case. Petitioner filed a second PCRA petition on November 27, 1996. That petition was untimely under a plain reading of the state PCRA

statute, 42 Pa.C.S. § 9545(b)(1), which requires that PCRA petitions be filed within one year of the judgment.[2] None of the statutory exceptions to the PCRA time limit apply to this case;[3] moreover, as this was not petitioner's first petition, the PCRA's "grace period" for new petitions did not apply. *Commonwealth v. Alcorn,* 703 A.2d 1054, 1057 (Pa. Super. 1997).[4] The Pennsylvania Superior Court dismissed petitioner's second PCRA petition as untimely on December 3, 1998, and the Pennsylvania Supreme Court denied *allocatur* on July 29, 1999. Petitioner's second PCRA petition was simply not "properly filed" under 28 U.S.C. § 2244(d) (2), *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998). Thus, it had no effect on the April 23, 1997 deadline for filing the habeas petition, as the Magistrate Judge found.

Both *Lovasz, supra,* and *Morris v. Horn,* 187 F.3d 333, 337-38 (3d Cir. 1999), conclude that whether a state collateral relief petition is "properly filed" under AECPA section 2244(d) is a matter of state law. Here, the state court has ruled on that question. It would violate the principles of comity for this Court to determine, through

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[2] **(b) Time for filing petition. –**

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final . . . .

42 Pa.C.S. § 9545(b)(1) (exceptions omitted) (P.L. 1118, No. 32 (Spec. Sess. No. 1, § 1, enacted November 17, 1995; effective 60 days thereafter, i.e., January 16, 1996).

[3] *See Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A of Response to Petition for Habeas Corpus), slip op. at 5-6.

[4] *See Commonwealth v. Pace* (Pa. Super. 1998) (Exhibit A of Response to Petition for Habeas Corpus), slip op. at 5.

equitable tolling, that the state courts were incorrect on that state question.[5]

Petitioner did not even raise his deprivation-of-legal documents claim in state court, and in any event, it is meritless. As a factual matter, petitioner appears to have had access to necessary documents long before the PCRA deadline passed. Even so, federal courts have been extremely reluctant to find equitable tolling based on such a claim. Lockdowns, lack of access to legal resources, and disturbances are all routine aspects of prison life. A petitioner must take them into consideration in deciding when to file a federal petition, for they "do not constitute extraordinary circumstances sufficient to equitably toll the statute of limitations." *Atkins v. Harris,* 1999 WL 13719 (N.D. Cal. 1999). *See also U.S. v. Ramsey,* 1999 WL 1210827 (E.D. Pa. 1999); *Asquith v. Volunteers of America,* 1 F.Supp.2d 405, 410 (D.N.J. 1998).

It is irrelevant whether the state supreme court had ruled on the 1995 PCRA amendments when he filed his second PCRA petition on November 27, 1996, over a year after those limitations had been enacted. When petitioner filed his second PCRA petition, the statute as amended on November 17, 1995 clearly stated that it was barred. The

[5] Such an approach would be an improper federal intrusion:

> It is not the office of a federal habeas court to determine that a state court made a mistake of state law. *See Estelle v. McGuire,* [502 U.S. 62, 67-68 (1991) (state court's interpretation and application of state law binds federal habeas court)]. . . . If the highest court [of a state] concludes that [a petitioner's] claims have not been raised properly in a state habeas proceeding, that is the end of the matter.

Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997).

courts had not yet ruled on the 1995 PCRA amendments, but the statute was clear.[6] Even where there is ambiguity in state law (which there was not here), whether a state petition is "properly filed" under state law is still a matter of state law for the state courts. Since *Lovasz,* the Third Circuit has held:

> We do not yet know how the state court will resolve the second petition. . . . [I]f the state court dismisses [the petitioner's] second PCRA petition for untimeliness, the AEDPA statute of limitations would not have been tolled during its pendency.

Morris v. Horn, 187 F.3d 333, 337-38 (3d Cir. 1999). That is exactly what happened here. The state courts held petitioner's second PCRA to be untimely; as a result, his habeas action was not tolled.

Before he filed it, petitioner was on notice that his second state collateral relief petition would be untimely under the express terms of the statute.[7] He should,

[6] Petitioner cites *Lambert v. Blackwell,* 134 F.3d 506, 524 (1997), not an equitable tolling case, for the contrary proposition. The Third Circuit did state therein that as of December 29, 1997, "no Pennsylvania court has been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision." *Id.* (discussing cases excusing filing delay under prior PCRA version). However, as acknowledged by this Court in *Peterson v. Brennan,* NO. 97-3477, 1998 U.S. Dist. LEXIS 12327 (August 11, 1998) at *20, twelve days earlier, on December 17, 1997, the Superior Court of Pennsylvania had construed the statute as written and had upheld the time-bar in *Commonwealth v. Alcorn,* 703 A.2d 1054, 1057 (Pa. Super. 1997). In other words, *Lambert* did not create uncertainty, which if it existed at all, had been resolved by *Alcorn.*

[7] Petitioner cites *Banks v. Horn,* 126 F.3d 206, 214 (3d Cir. 1997), for the contrary proposition. That was not an equitable tolling case, but

(Continued on following page)

therefore, have filed his habeas petition then, during the one-year "grace period" after the public enactment of AEDPA. His failure to file a habeas petition by the April 23, 1997, AEDPA grace-period deadline was, at the very least, a long-shot gamble. There is no reason to reward him for taking this chance.

Petitioner complains that "when he filed his second PCRA petition, no state or federal case law existed to provide him with proper notice that he would be time[-]barred. . . ." Objection at 8. This statement is both irrelevant and mistaken in its premise. There need be no judicial action for there to be a valid notice of a valid law. The clear amendments to the PCRA statute gave him more than adequate notice.

By filing only a second PCRA petition on November of 1996 and not also a federal habeas petition, petitioner speculated that the courts would not apply the plain language of the PCRA amendments straightforwardly. All he complains of today is that they did. The fact that he chose to proceed in this fashion does not constitute an extraordinary circumstance preventing him from filing or misleading him. It does not warrant equitable tolling, because there was nothing unfair about the state court's application of the time-bar.

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a capital case. As such, it presented a special situation, because the Pennsylvania Supreme Court had indicated that it would apply a "relaxed waiver" rule to capital cases; it was unclear whether this "relaxed waiver" would operate to suspend a PCRA time-bar. Eventually, the state courts held that the time-bar would be strictly applied, even in capital cases. In this non-capital case, by contrast, there was never any prospect that a "relaxed waiver" rule would be applied, and petitioner had no reason to believe that his second PCRA petition would be timely or reviewable.

If petitioner's strategy were held to warrant equitable tolling, that would, in effect, be an amendment of 28 U.S.C. § 2244(d)(2). Instead of providing for tolling during while a "properly filed application" is pending, the statute would now provide for tolling while any "arguably proper but actually improper application" is pending.

Additionally, although he is required to do so in order to invoke equitable tolling, petitioner has made no showing that he exercised "reasonable diligence" in presenting his federal habeas claims in a timely fashion. *Jones v. Morton*, 195 F.3d at 160. Again referring to his subjective beliefs as controlling authority, he merely states that he "*believes* that he has demonstrated that he . . . exercised reasonable diligence. . . ." Objection at 7. He nowhere shows, however, that he has. In addition to the discussion above regarding what documents he did and did not have after the supposed prison disturbance, respondents note the passage of *eleven years* since the event he blames for his great delay in bringing this petition. The only event he claims justifies his delay in filing both his PCRA and his habeas petition, a prison disturbance, even if it did occur, was in October of 1989, by his own account. He blames this event for his lack of knowledge of his own case and his late filing of his habeas petition *over* a *decade* later. He attaches *one* letter, dated 1990, in which he requests additional copies of his records. Even if it were admitted that that letter was sent and received and that he had a right to additional copies, which it is not, his letter would still not help him. He remained represented by counsel for another two years after he send that letter. Nowhere does he specify what he was doing in the exercise of reasonable diligence in pursuing his claims even after he wrote the letter. This does not constitute reasonable diligence.

Even if, hypothetically, equitable tolling were somehow to apply to the period when the Pennsylvania courts had not yet ruled upon the amendments to the PCRA, that would still not excuse petitioner's lateness in filing the present habeas petition. The state supreme court promulgated amended rules of criminal procedure in August of 1997 that implemented and reiterated the statutory deadline. Pa.R.Crim.P. 1500 *et seq.*, 42 Pa.C.S. The Superior Court held on December 17, 1997, that the PCRA statutory amendment means what it says. *Alcorn, supra.* The Pennsylvania Supreme Court denied allowance of appeal in *Alcorn* on June 8, 1998. *Commonwealth v. Alcorn,* 555 Pa. 711, 724 A.2d 348 (1998) (Table). Petitioner did not file his habeas petition within a year of any of these dates, but only on December 27, 1999.

Petitioner argues that the PCRA court misled him into thinking the unambiguous statute did not apply, though it said nothing of the sort. Noting that before the Superior Court dismissed it on as time-barred, the PCRA court erroneously dismissed his petition not as time-barred, but as previously litigated and meritless,[8] petitioner claims that the PCRA court's approach misled him into thinking that the time bar did not apply, and that he was somehow vaguely prevented from complying with AEDPA's deadline. But this makes no sense. Even if he was somehow

[8] It is true that the PCRA court found that the single claim raised in petitioner's second PCRA petition was previously litigated and meritless, without reference to the statutory time-bar. Such a finding should support, not detract from, the dismissal of the present petition, however. Moreover, the PCRA court did not find the time-bar inapplicable, nor that the second PCRA petition was timely. Finally, the PCRA court's error of omission was corrected by the Superior Court, which found the petition time-barred.

misled by the PCRA court's decision, in spite of the PCRA's plain language, that does not excuse him from failing to file his habeas petition during the eight months between November of 1996, when he filed his second PCRA, and July of 1997, when the PCRA court ruled. Nor does it excuse him from failing to file in a prompt and reasonably diligent fashion during the twelve months between the time the Superior Court ruled that his second petition was time-barred in December of 1998, and the time he filed his habeas petition, on December 27, 1999. Petitioner's excuse, interpreted generously, covers only the time-period between the PCRA court's ruling and the Superior Court's ruling, a period of one year and five months. This is still not enough to save his habeas petition. His failure to file for habeas relief before and after his alleged confusion prevents any application of equitable tolling.

Whatever uncertainty there may have been about the state time bar was resolved long before petitioner filed his petition. Starting in late 1998, as acknowledged by petitioner, the Pennsylvania Supreme Court made clear in a series of cases that, even in the capital context, the PCRA filing deadline was jurisdictional and would be enforced strictly. This series included *Commonwealth v. Peterkin,* 554 Pa. 547, 722 A.2d 638 (December 21, 1998), *Commonwealth v. Cross,* 555 Pa. 603, 726 A.2d 333 (February 25, 1999), *Commonwealth v. Banks,* 566 Pa. 1, 726 A.2d 374 (March 2, 1999), and *Commonwealth v. Yarris,* 557 Pa. 12, 731 A.2d 581 (May 21, 1999). *See Holman v. Gillis,* 58 F.Supp. 2d 587, 593-95 (E.D.Pa. July 19, 1999).

Petitioner did not file his habeas petition until over a year after *Peterkin* had been decided, and he presents no excuse whatsoever for this final period of delay. No reasonable interpretation of equitable tolling justifies this

extra time. *See New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1126 (3d Cir. 1997); *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999) (no equitable tolling where petitioner waited six months to file habeas petition after end of alleged tolling event). *See also Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993).

Since he has no excuse for his delay, petitioner is not entitled to equitable tolling.

Finally, in addition to the foregoing, the reasons for denying petitioner habeas relief are addressed in the Report and Recommendation itself and in respondents' original response to the Petition for Writ of Habeas Corpus, upon which respondents will additionally rely to support their position that the Report and Recommendation should be adopted and the petition denied.

WHEREFORE, respondents respectfully request that this Court adopt the Magistrate Judge's Report and Recommendation and deny the petition for writ of habeas corpus.

Respectfully. submitted,

/s/ [Illegible]
JOHN W. GOLDSBOROUGH
Assistant District Attorney

/s/ [Illegible]
THOMAS W. DOLGENOS
Assistant District Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL ACTION
v.	:	
DONALD VAUGHN, et al.	:	NO. 99-6568

CERTIFICATE OF SERVICE

I, THOMAS W. DOLGENOS, hereby certify that on May 22, 2000, a copy of the foregoing pleading was served by placing same, first class postage prepaid, in the United States Mail addressed to:

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/s/ [Illegible]
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	**CIVIL ACTION**
	:	**99-6568**
v.	:	
DONALD VAUGHN, et al.	:	

Memorandum

Giles, C.J. June 7, 2001

Factual and Procedural History

I. Petitioner's Requests for Collateral Relief

On February 13, 1986, Petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession of an instrument of crime and the second-degree murder of Randolph Baldwin. Judge Savitt sentenced Petitioner, who was then seventeen years old, to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw his guilty plea, and he did not file a direct appeal.

However, six months later on August 21, 1986, Petitioner filed a pro se petition under the Pennsylvania Post Conviction Hearing Act ["PCHA"], 42 Pa. C.S.A §9541, et seq. Through appointed counsel, Petitioner eventually filed an amended petition claiming both ineffective assistance of trial counsel and trial court error. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA

court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

On November 27, 1996, Petitioner filed a second request for collateral relief under the Pennsylvania Post Conviction Relief Act ["PCRA"], which replaced the PCHA in 1988. When Petitioner filed the PCRA petition, the Act had recently been amended. The amendments, which were enacted on January 16, 1996, placed new time limits on PCRA petitions. The relevant part of the limitation follows:

> (b) Time for filing petition. –
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. C.S.A. §9545.

II. The Timeliness of the Petitioner's PCRA Petition was Uncertain Based on the Statutory Language and Legislative Note.

Section 9545 of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction became final, unless the petition falls within one of the enumerated exceptions. At the time Petitioner filed his PCRA petition in November 1996, his conviction had become final over ten years before, and his petition did not claim any of the statutory exceptions to the one year time limit. Since Petitioner's conviction occurred prior to the enactment of the PCRA amendments, it could not have been clear how, if at all, the amendments would apply to the petition when it was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note about legislative intent. It stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under 42 Pa.C.S. Ch. 95 Subch. B if the petitioner's first petition is filed within one year of the effective date of the act." The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendment, had one year after the enactment of the act to file a collateral relief petition.

III. Opinions from Federal District Courts Reflected the Fact that the Timeliness of Petitioner's PCRA Petition was Uncertain when it was Filed.

When Petitioner filed his PCRA petition in November 1996, it was not then known how the Pennsylvania state

courts would apply the above quoted provision. No Pennsylvania state court opinion had been rendered interpreting it. As of September 1997, the third circuit found that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA. Specifically, in *Banks v. Horn*, the court noted that:

> While it is true that the text of the 1995 PCRA amendments supports these contentions [that the 1995 amendments bar a second collateral relief petition filed more than one year after a conviction], it is not clear that these amendments are dispositive. The Commonwealth does not refer us to a single case applying the PCRA as amended in 1995 to support its views. Furthermore, in *Szuchon* and *Beasley* the Pennsylvania Supreme court addresses the merits of claims which seemingly were precluded by the PCRA provisions then in force.

126 F.3d at 214. *Banks* was a death penalty case, and the *Szuchon* and *Beasley* were both death penalty cases. Further, the *Banks* opinion notes that "the Pennsylvania Supreme Court does not apply Pennsylvania procedural bar rules consistently in death penalty cases." 126 F.3d at 213. However, the *Banks* opinion explicitly extends its reasoning beyond death penalty cases. The opinion states:

> It is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississippi*. That time, however, has not yet been reached.

126 F.3d 214 n.3. (citation omitted).

Trial courts in this district also noted that the ambiguity of the 1995 PCRA amendments extended to non-capital cases. *See Hammock v. Vaughn,* 1998 WL 163194, at *6 (E.D. Pa. April 7, 1998) ("The possibility exists, therefore, that . . . the statute of limitations bar will be waived by Pennsylvania courts in some cases. There is thus a lack of certainty with respect to state application of this procedural bar . . . "); *Peterson,* 1998 WL 470139, at *6 (E.D. Pa. August 11, 1998) (same).

Eventually, Pennsylvania state courts did interpret the 1995 PCRA amendments and held that the 1995 amendments were jurisdictional and would be adhered to strictly. *See Commonwealth v. Banks,* 726 A.2d 374, 375-76 (Pa. 1999). Further, the 1995 PCRA amendments prohibited all second collateral relief petitions filed more than one year after a conviction became final, regardless of if the first petition was filed prior to the enactment of the 1995 PCRA amendments. *See id.* A recent federal district court case noted that the ambiguity related to the force of the 1995 PCRA amendments has only recently been remedied. *See Holman v. Gillis,* 58 F. Supp. 587, 594-96 (July 21, 1999) ("In light of the mandate by the Pennsylvania Supreme Court . . . since December 1998, the court finds . . . that it can now be said with confidence that the Pennsylvania Supreme Court has consistently and regularly applied the 1995 amendments to the PCRA, namely, the one-year statute of limitations, as a procedural bar to all untimely PCRA petitions that do not qualify for any of the three exceptions.").

IV. Court Proceedings.

Indeed, the uncertainty about the force of the 1995 PCRA amendments extended to Pennsylvania state courts. On June 23, 1997, for example, the PCRA court did not dismiss Petitioner's PCRA petition as time barred. Rather, it denied the petition on its merits. Petitioner appealed.

Seven months after the dismissal of Petitioner's petition, the Superior Court of Pennsylvania issued the first state appellate court decision interpreting the recent amendments to the PCRA. *See Commonwealth v. Alcorn,* 703 A.2d 1054, 1056 (Pa. Sup. Ct. Dec. 17, 1997) ("Our research indicated no prior decisions interpreting this section [42 Pa.C.S. § 9545]; therefore its applicability to this case presents a question of first impression."). The Superior Court in *Alcorn* held that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after the underlying conviction became final, even if the conviction became final, and the first petition was filed, before the enactment of the 1996 amendments. *Alcorn,* 703 A.2d at 1056-57.

The Commonwealth then wrote a letter brief to the Superior Court concerning the pending appeal of Petitioner's PCRA petition. The brief argued that based on *Alcorn* the petition should be dismissed as time-barred. The Superior Court agreed and, on December 4, 1998, dismissed the petition as time-barred. Petitioner requested re-argument of the case, stating for the first time in a motion that prison officials had wrongfully withheld legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations pursuant to 42 Pa. C.S.A. §9545(b)(1)(i). The Superior Court denied his request for re-argument without stating

reasons. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was declined by the Supreme Court on July 29, 1999.

On December 27, 1999, petitioner filed the instant federal habeas petition pro se. His petition included claims, among others, that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) that his sentence was given pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of Due Process Clause of the U.S. Constitution. The petition was referred to United States Magistrate Judge M. Faith Angell for a report and recommendation.

Judge Angell recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that habeas petitions be filed within one year of the date that a petitioner's conviction becomes final. *See* 28 U.S.C. §2244(d)(1). Judge Angell accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996 have until one year from the enactment of the habeas statute of limitations to file their petitions. *See Burns v. Morton,* 134 F.3d 109, 111 (3d Cir 1998). Under this reasoning, Petitioner had only until April 23, 1997 to file his federal habeas petition; his petition had been filed two and a half years after this deadline. Section 2244(d)(2) of Title 28 states that a "properly filed" pending petition for state collateral relief tolls the statute of limitations for federal habeas purposes. Judge Angell reasoned that Petitioner's state collateral

relief petition was not "properly filed," and, thus, did not toll AEDPA's statute of limitations.

The third circuit has determined that a "properly filed" state collateral relief petition is "one submitted according to the state's procedural requirements, such as the rules governing time and place of filing." *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998). When Petitioner filed his state court petition, it was unclear as a matter of state law if his state petition would be time-barred. Once the Pennsylvania state courts delineated the new time limits of the PCRA, a Pennsylvania Superior Court dismissed Petitioner's PCRA petition as time-barred. Judge Angell concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not "submitted according to the state's procedural requirements" and thus, was not "properly filed" for the purpose of tolling the federal habeas statute. Since Petitioner had no "properly filed" state petition pending since the enactment of AEDPA, Judge Angell recommended that Petitioner's federal habeas petition should be dismissed because it was filed well after the statute of limitations period for filing a federal habeas petition.

Petitioner filed an objection to the Magistrate Judge's report and recommendation claiming that his state court petition should have tolled AEDPA's statute of limitation either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Department of Corrections,* 144 F.3d 616 (3d Cir. 1998). The United States responded to Petitioner's Objection. After review of the applicable case law, this court concludes that the petition was "properly filed" for purposes of tolling the federal habeas statute of limitations,

and even if it was not properly filed, Petitioner was entitled to equitable tolling while his state court petition was pending.

Discussion

I. The PCRA Petition was Properly Filed and Tolled AEDPA's Statute of Limitations Because it Abided by all of Pennsylvania's Clear and Well Established Procedural Requirements.

AEDPA's statute of limitation is tolled while a "properly filed" post-collateral relief petition is pending in state court. Last term, the United States Supreme Court defined a "properly filed" petition as follows:

> An application is "filed," as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. *See, e.g., United States v. Lombardo,* 241 U.S. 73, 76, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed"); Black's Law Dictionary 642 (7th ed.1999) (defining "file" as "[t]o deliver a legal document to the court clerk or record custodian for placement into the official record"). And an application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. *See, e.g., Habteselassie v. Novak,* 209 F.3d 1208, 1210-1211 (10th Cir. 2000); 199 F.3d, at 121 (case below); *Villegas v. Johnson,* 184 F.3d 467, 469-470 (5th Cir. 1999); *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998).

Artuz v. Bennett, 121 S.Ct. 361, 363-64 (2000).

Previously, the third circuit had defined a "properly filed" PCRA petition as follows:

> We believe that "a properly filed application" is one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R.Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons.Stat. Ann. § 9545(b) (1). If a petitioner complies with these procedural requirements, or other procedural requirements the state imposes, his petition, even a second or successive petition, is "a properly filed application" for purposes of § 2244(d) (2). While we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent PCRA petitions, *see Commonwealth v. Lawson,* 519 Pa. 504, 549 A.2d 107 (1988), Pennsylvania allows for the filing of second or subsequent PCRA petitions, *see* 42 Pa. Cons.Stat. Ann. § 9545(b)(1), and courts occasionally grant relief in such proceedings, *see e.g., Commonwealth v. Morales,* 701 A.2d 516 (Pa.1997).

Lovasz v. Vaughn, 134 F.3d 146, 148-149 (3d Cir. 1998). Thus, it is now fair to conclude that a PCRA petition is properly filed in Pennsylvania for purposes of tolling AEDPA's statute of limitations when it is delivered and accepted in accordance with applicable Pennsylvania laws

and rules. Petitioner's PCRA petition was delivered and accepted in accordance with applicable Pennsylvania laws and rules. The PCRA court accepted Petitioner's application for filing and ruled on its merits. The fact that state law was subsequently established that resulted in the Superior Court of Pennsylvania dismissing the petition as time-barred does not alter this essential fact.

The United States Supreme Court has listed the types of requisite procedural requirements, among them timeliness, that warrant a state collateral relief petition being considered "properly filed." These include the forms used, the office to which the form is sent, and payment of the relevant filing fee. *See Artuz,* 121 S. Ct. at 364. Similarly, the third circuit has noted that, in addition to the timeliness of the petition, a PCRA petition must be filed with the same court in which the petitioner was sentenced in order to be properly filed. *See Lovasz,* 134 F.3d at 148. These examples show that the "properly filed" requirement is meant to disallow tolling only when state petitions fail to comply with clear and well established procedural requirements. *See Emerson v. Johnson,* 243 F.3d 931, 934 (5th Cir. 2001) ("Although we might have read [the state statute] to prohibit Emerson's suggestion for reconsideration, given Texas case law, as well as the *Artuz* Court's broad reading of the phrase 'properly filed,' we must conclude Emerson 'properly filed' his suggestion for reconsideration."); *Hardy v. Secretary for the Dept. of Corrections,* 246 F.3d 1300, 1302 (11th Cir. 2001) (suggesting "properly filed" under *Artuz* means "conform[ing] with Florida's basic procedural rules"). Therefore, Petitioner's PCRA petition was proper for federal habeas purposes given the state of the law at the time his petition was filed.

II. Third Circuit Precedent Supports Defining a Properly Filed Petition as One that Comports with Clear and Well Established State Procedural Requirements.

The third circuit's interpretation of the term "properly filed" in 28 U.S.C. § 2244(d)(2) requires that state collateral relief petitions that have complied with all clear and established state law procedural requirements toll AEDPA's statute of limitations.

In *Lovasz,* the third circuit stated:

> We have yet to consider what constitutes "a properly filed application" to trigger the tolling mechanism of § 2244(d)(2). Principles of comity inform our decision. In our federal system, "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson,* 501 U.S. 722, 731, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). Such respect for the states has given rise to the well-established rule that a federal court should not find a state prisoner's claims procedurally barred from federal habeas review unless state law "clearly foreclose[s]" review of the claims. *Toulson v. Beyer,* 987 F.2d 984, 987 (3d Cir.1993); *see Banks v. Horn,* 126 F.3d 206, 211 (3d Cir.1997); *Doctor v. Walters,* 96 F.3d 675, 683 (3d Cir.1996). Moreover, in enacting AEDPA, of which § 2244(d) is a part, Congress intended to "reduce federal intrusion into state criminal proceedings." *Banks,* 126 F.3d at 213. Thus, if a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent

> petition is pending in the state court system. Nor should we discourage petitioners from exhausting all their claims in state court, even by means of a second or subsequent petition for post-conviction relief where permissible under state law, before seeking habeas review in federal court.

Lovasz, 134 F.3d at 148.

Federal courts must give state courts the first opportunity to correct their alleged errors. Tolling AEDPA's statute of limitations whenever petitioners have complied with all the state courts' clear and established procedural rules squares with the requirement of allowing a state the first opportunity to correct alleged violations of federal rights. A petitioner will be discouraged from filing in state court if it is believed that there is a possibility that the opportunity to bring a federal habeas petition will be lost should the state court end up finding that the state petition is procedurally barred. *See Swartz v. Meyers,* 204 F.3d 417, 419 (3d Cir. 2000); *Hardy,* 243 F.3d at 935.

The third circuit has held that "in the absence of a state court decision indicating that a habeas corpus petitioner is clearly precluded from relief, the district court should dismiss the claim for failure to exhaust even if it is not likely that the state court will consider petitioner's claim on the merits." *Banks v. Horn,* 126 F.3d 206, 211 (3d Cir. 1997). *See also Lines v. Larkins,* 208 F.3d 153, 163 (3d Cir. 2000) (noting petitions should be dismissed for failure to exhaust even it is "unlikely that further state process is available"); *Lambert v. Blackwell,* 134 F.3d 506, 517-18 (3d Cir. 1997). Thus, the third circuit requires that petitioners exhaust in state court whenever a petitioner is not clearly precluded from relief on state procedural grounds, even if

it is very likely, though not certain, that the petition will be dismissed in state court on procedural grounds. It follows that when petitioners file petitions in state court that are not clearly foreclosed by state procedural law, the petitions must be considered properly filed and toll AEDPA's statute of limitations. The third circuit took this position when it determined AEDPA's statute of limitation would toll while the time to file a state appeal of the denial of a PCRA petition was running, even if the petitioner did not file such an appeal. Specifically, the court stated that its decision to toll AEDPA during the time allowed for an appeal of a state court decision

> finds support in the principle of state-remedy exhaustion. In *Mills v. Norris,* 187 F.3d 881 (8th Cir. 1999), the Court of Appeals for the Eighth Circuit applied the principle of exhaustion to a somewhat similar factual scenario. Mills had filed a petition for post-conviction relief before the enactment of AEDPA. On August 15, 1996, the trial court denied his petition. Four days later Mills filed a notice of appeal with the Arkansas Supreme Court, but failed to file the record on appeal within the requisite ninety days as provided by Arkansas' procedural rules. The Arkansas Supreme Court took no action on the appeal. Then, on October 9, 1997, Mills filed a federal habeas petition. The issue before the Eighth Circuit was, in light of Mills' failure to perfect his appeal, on what date did his post-conviction relief motion cease "pending." See *id.* at 882, 884.
>
> Mills argued that the period was tolled until the end of the 90 days to perfect his appeal. The State argued that the appeal was not pending because Mills failed to timely file the record on

appeal as required by the appellate rules. After reviewing the principles of exhaustion and comity, the court concluded:

> In this case, if Mills had filed his federal petition during the ninety days following the filing of his notice to appeal to the Supreme Court of Arkansas, the federal petition would surely have been dismissed for failure to exhaust state remedies, because there was still time to perfect his state appeal by filing the record with the Clerk of the Arkansas Supreme Court. That being so, we conclude the state postconviction appeal was "pending" for purposes of § 2244(d) (2) until at least November 17, 1996, the end of that ninety-day period. Thus, Mills timely filed his federal habeas petition on October 9, 1997.

Id. at 884.

> We find these reasons convincing. If Swartz had attempted to seek federal habeas corpus relief while there was still time to seek allowance of appeal, the petition would automatically be dismissed for failure to exhaust state remedies.

Swartz, 204 F.3d at 422.

Similarly, the Petitioner is entitled to a tolling of AEDPA's statute of limitations since his state petition was filed at a time when a habeas petition, if filed in federal court, would have been dismissed. *See* Part IIIB, infra. Therefore, this court holds that Petitioner's state court petition tolled AEDPA's statute of limitations and that the federal habeas petition must now be considered on its merits.

III. The Statute of Limitations Equitably Tolled While the PCRA Petition was Pending.

A. Equitable Tolling Is Allowed in Extraordinary Circumstance.

Petitioner is also entitled to equitable tolling to the extent that he did not file his federal habeas petition timely. The third circuit has allowed exceptions to AEDPA's one year statute of limitations where strict adherence to the statute of limitations would be unfair. In *Miller v. New Jersey Department of Corrections,* 145 F.3d 616 (1998), the court stated that

> For guidance of the district court, we observe that equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Generally, this will occur when the petitioner has "in some extraordinary way . . . been prevented from asserting his or her rights." The petitioner must show that he or she "exercised reasonable diligence in investigating and bringing [the] claims." Mere excusable neglect is not sufficient.

145 F.3d at 618-619 (citations omitted) (brackets and ellipses in original). Here, Petitioner exercised reasonable diligence in bringing his claims and it would be unfair, and would rise to an extraordinary deprivation of rights, if under these circumstances he were barred by AEDPA's one year statute of limitations.

B. The Petitioner Would Not Have Been Able to File His Petition in Federal Court in 1996.

The Petitioner would not have been allowed to file a petition in federal court within one year of when AEDPA

was enacted because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they would be thought to be excluded by the 1995 amendments to the PCRA. *See Banks,* 126 F.3d at 211-14. *See also Hammock v. Vaughn,* 1998 WL 163194, at *6 (April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments.] This lack of certainty requires dismissal of the petition."); *Peterson,* 1998 WL 470139, at *6 (August 11, 1998) (same). Only recently have the state courts interpreted the 1995 amendments to the PCRA conclusively enough that federal courts do not have to dismiss habeas petitions that seem to be barred by the text of the 1995 amendments. *See Lines v Larkins,* 208 F.3d at 164 (3d Cir. 2000) ("[I]t is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis,* 58 F.Supp. 587, 594-96 (July 21, 1999).

C. AEDPA's Statute of Limitations Is Tolled Due To Pendency of Petitioner's 1996 PCRA Petition.

It would be patently unfair if the federal statute of limitations ran during the time in which Petitioner was not allowed to bring a federal petition. Accordingly, AEDPA's statute of limitations was equitably tolled while Petitioner's second PCRA petition was pending from November 27, 1996 to July 29, 1999.

Petitioner's sentence was life without the possibility of parole and was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of 'equity would make rigid application of a limitation period unfair' and whether petitioner has 'exercised reasonable diligence in investigating and bringing [the] claims.'" *Fahy v. Horn,* 240 F.3d 239, 245 (3d Cir. 2001) (citing *Miller,* 145 F.3d at 618). The *Fahy* court went on to state, "We elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy,* 240 F.3d at 245. Similarly, this case calls for leniency since the consequence facing Petitioner, the certainty of spending age seventeen until his life ends in prison, is extremely grave.[1] Should the court not toll AEDPA's statute of limitations, then Petitioner will have to spend life in prison without being allowed federal review of his claims. *See Fahy,* 240 F.3d at 245. Accordingly, this court finds that extraordinary circumstances exist in this case and that AEDPA's one-year statute of limitations was equitably tolled while Petitioner's PCRA petition was pending.

Conclusion

This court finds that Petitioner was entitled to statutory tolling and equitable tolling while his PCRA petition was pending. Because Petitioner's conviction became final

[1] The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment . . . exceeds it." *Solem v. Helm,* 463 U.S. 277, 297 (1983).

before the enactment of AEDPA, he had one year from April 24, 1996, excluding the period in which the statute equitably tolled, to file his federal habeas petition. *See Burns,* 134 F.3d at 111.

The federal statute of limitations ran from April 24, 1996 (the date of the enactment of AEDPA) to November 26, 1996 (the day before petitioner filed his PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when Petitioner filed his federal habeas petition. Given the one year statute of limitations, Petitioner had until December 24, 1999 to file his federal habeas petition. Petitioner dated his federal habeas petition December 22, 1999. The clerk of the court marked Petitioner's petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns,* 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes Petitioner gave his petition to prison officials by December 24, 1999 making his federal habeas petition timely filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	**CIVIL NO.**
	:	**99-6568**
v.	:	
	:	
DONALD VAUGHN, et al.	:	

ORDER

AND NOW, this 7th day of June 2001, upon consideration of Petitioner's objections to the report and recommendation of Magistrate Judge M. Faith Angell, and the Commonwealth's response thereto, it is hereby ORDERED that the report and recommendation is DISAPPROVED. This court will proceed with consideration of the merits of the petition.

BY THE COURT:

_____

JAMES T. GILES, C.J.

copies by fax on
to

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE	:	CIVIL NO.
	:	99-6568
v.	:	
DONALD VAUGHN, et al.	:	

ORDER

AND NOW, this 14th day of June, 2001, it is hereby ORDERED that Billy H. Nolas, Esquire, of the Federal Court Division of the Defender's Association of Philadelphia, is APPOINTED to represent Petitioner in the above matter.

BY THE COURT:

/s/ James T. Giles
JAMES T. GILES, C.J.

copies by fax on
to

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION NO. 99-6568
Petitioner,	:	
	:	Philadelphia, Pennsylvania
vs.	:	January 29, 2002
DONALD VAUGHN,	:	2:11 o'clock p.m.
Respondent	:	

.....

ORAL ARGUMENT
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Laws Transcription Service

Proceedings recorded by Electronic Sound Recording; transcript provided by computer-aided transcription service.

[2] (The following occurred in open court at 2:11 o'clock p.m.:)

THE COURT: Good afternoon.

ALL: Good afternoon, your Honor.

THE COURT: Please be seated.

Your appearances, please, for the record.

MR. DOLGENOS: Tom Dolgenos, your Honor, from the Philadelphia District Attorney's Office, for the respondents – for the petitioners in the motion for reconsideration. And with me is John Goldsborough also from our office.

THE COURT: Thank you.

MR. NOLAS: On behalf of the petitioner, your Honor, Billy Nolas, responding to the motion for reconsideration.

THE COURT: Thank you.

All right. Where did the Judge go wrong?

MR. DOLGENOS: Your Honor, though it's hard to believe – I'm not sure how you want me to proceed. Should I go to the podium or –

THE COURT: Try the podium. That way, you won't see the daggers in your back.

MR. DOLGENOS: All right. I try to avoid them.

Your Honor, as I can – as I'm sure you know, our position here, despite the volume of briefing, is actually pretty simple, and that is, that this case is controlled by

Fahey, both with respect to statutory tolling and with [3] respect to equitable tolling.

As you know, many of these – counsel from our office and from opposing counsel's office, Mr. Nolas' office, were both involved in *Fahey*, many of these same arguments were raised at that point. And the Third Circuit held specifically, rejected statutory tolling, even in a capital case, where there was more of an argument of uncertain application of the PCRA time bar, and rejected equitable tolling in non-capital cases such as this one.

I'm not sure exactly how your Honor would like me to go through this. What I might do is just –

THE COURT: Start from the top.

MR. DOLGENOS: Okay.

THE COURT: Pretend you have to educate me about this whole matter.

MR. DOLGENOS: What I thought I'd do is I would talk about counter-arguments or possible counter-arguments that your Honor raised in your opinion and that Mr. Nolas raised in his brief, counter-arguments, the applicability of *Fahey*.

Most generally is the uncertainty problem. That is, that the PCRA time bar was uncertain in application because of the possibility that the kind of showing that used to get you back into PCRA Court before the time bar was passed would still be available to overcome the time bar, even after it was passed.

[4] First of all – and I'm not going to spend a lot of time on this – respectfully, from our point of view, it was not uncertain. It was as clear as a bell.

Every single state appellate court to address the time bar has applied it in exactly the same manner, and that manner is exactly in accordance with the way it's written. That is, from January of '96 when the PCRA time bar became effective, state prisoners in Pennsylvania were required or now are required to file their PCRA petitions within one year of the – their judgment became final. For all their convictions, there is a one-year grace period from January of '96 to January of '97 for first petitions. There was no special grace period for second petitions. And all of this came under the jurisdiction and proceedings heading of the statute.

Perhaps we might think, in our own judgment, that this is a draconian statute, to use Mr. Nolas' words, or wrong, or unwise. But it is the statute, it is the law, and it is our position that it was as clear as a bell and that in state court, there really is no, and has been no dispute about that.

With respect to uncertainty in general, let's assume there was some. We – there is no uncertainty exception to the properly filed rule, that is, the tolling provision in the habeas statute.

[5] The idea of uncertainty and its effect on federal habeas proceedings is borrowed from the procedural default context, where you have claims that were found by the state courts to be procedurally defaulted, based on the state procedural rule. Those such rules have to be adequate and independent. One of the tests for adequacy is whether or not the test is certain in application.

The U.S. Supreme Court, in *Artuz v. Bennett,* was very careful to separate the two, that is, the procedural default test applied to claims, on the one hand, and the statute; of limitations test, the tolling test as applied to applications for collateral relief.

If I could make a suggestion, it's that if we're talking about uncertainty, if we think that it indicates a certain matter on unfairness in the proceedings, that's better addressed to equitable tolling rather than statutory tolling. Statutory tolling is just what the statute says. And I submit in the federal habeas statute, there is no provision for uncertainty.

And if you think about it, it gets to be very thorny. If there is an uncertainty exception, what exactly is the test? How uncertain an application does the rule have to be? Is it just a matter of there's a statute that hasn't been applied by a state appellate court? Or even if it is applied, if there's a residual uncertainty that someone can [6] articulate, is that uncertain enough? Is there a diligence requirement? That is, do we require that state prisoners do their best to conform with the most narrow version of this uncertain test, or is it automatic?

Is there – if we find that a rule is uncertain, does that mean necessarily that the petition that was rejected under that rule is properly filed? And who determines uncertainty? Is it the federal courts? If the state court has held specifically that a law is uncertain, is that a matter to be revisited by federal courts? I think it raises some troubling questions if the uncertain test is read into the properly filed part of the habeas statute.

And I think here – the uncertainty test application here raises some troubling issues too. Let me see how I

can say this clearly. The passage – as I understand Mr. Nolas' and Mr. Natale's argument, the passage of the PCRA time bar is essentially meaningless in terms of federal habeas. That is, if state prisoners can think of an exception or think of a reason why it shouldn't apply to them – and I know a creative lawyer like Mr. Nolas will be able to think and has thought of many reasons why it shouldn't be applied – then they don't have to comply with it. They can act, that it – act as if it was never passed. Another way to think about is their legal obligation to act hasn't changed at all.

In federal – that is, in federal habeas, we're [7] looking to what the state law was. And as far as I can tell, in 1993, say, before the time bar was passed, if a state prisoner wanted to file a second or third PCRA and could articulate some miscarriage of justice exception, well, then, that was – he might be able to convince the Court to review the successive petition.

Despite the passage in 1996 of a time bar, which clearly at least raised the suggestion that there would be a time bar problem, he – there is no – as far as I can tell from Mr. Nolas' argument, there is no diligence requirement, there is no requirement that the prisoner – Mr. Pace, in this case – try to avoid the time bar. He doesn't have to try, so long as he has in his mind a reason why it shouldn't apply to him.

And I think ultimately this is borne out of a deep disrespect for the state legislature. Now, we might have our opinions about the state legislature in general about this law in particular, but the fact is it's a law. The fact is it says you have to file your PCRA petitions within one year, and that – and the first petition, you have that grace

period; the second petition, you don't. And I think under any test of – or any rational view of what litigants should do, we should be requiring them to try to comply.

In this case – excuse me, your Honor. I seem to be getting a cold.

[8] THE COURT: Would you like some water?

MR. DOLGENOS: That's okay. I'm fine. Thank you. And I want to talk briefly, if I can, about the petitioner's authority for the alleged uncertainty, because I know that Mr. Nolas, in his brief, in his response to our reconsideration motion, talked a lot about how every court or a lot of courts to address the PCRA time bar have concluded that it was uncertain.

First of all, I want to reiterate my view that the state courts have spoken with one voice on the time bar, and that their uncertainty theory is really something that's been pedaled in federal court. It hasn't been pedaled at all in state court, probably for the good reason that state courts would reject it.

Now, Mr. Nolas does cite a whole bunch of or several cases in which the time bar was applied straightforwardly by the Superior Court. The trial court hadn't applied it. But in all of those cases, I think all of those cases – I don't want to say I'm absolutely sure, but I think in all of those cases, the time bar wasn't raised below.

So what you have there is imperfect people and imperfect courts. It would be nice if every time we walk into a courtroom to litigate a case, everybody raises the important things that need to be raised and everybody

notices that there's a statute of limitations. The fact is it's not [9] going to happen. That doesn't mean the trial courts rejected the time bar. It just wasn't applied.

And then the Superior Court, the error correcting court, reviewed the proceedings and said, well, you know what? You didn't have jurisdiction in the first place. That's not the same as uncertainty, your Honor. That's simply what happens. I mean, I'm sure that there are plenty of examples in federal court in which the time bar hasn't been applied just because people haven't raised it. That stuff happens. It doesn't mean that it's uncertain. It just means that people aren't perfect.

Mr. Nolas also cites a bunch of – some federal cases. A lot of them are capital cases in which at play was the relaxed waiver doctrine, or practice, or rule, in which – which threw an extra monkey wrench into the question of whether or not the PCRA time bar would be applied. And that obviously does not apply here. There's no relaxed waiver for non-capital sentences.

And there are some other courts – federal courts, which, mostly in the exhaustion context couldn't find that state review was clearly foreclosed because of the possibility that the litigant, the prisoner would meet – could meet the exceptions to the time bar in state court. But what that is is sort of the opposite of what we're doing here. What that is is, out of respect for the state courts, [10] let's let them make the decision about whether or not somebody is time barred.

What we're doing here is we have a decision from the state courts. The decision here is that this petition is untimely. The decision here is that the courts had no. jurisdiction. The question is, what do we do with a decision

from the state court? Do we declare it basically meaningless along with the statute, or do we give effect to it? And I submit that under *Fahey,* under *Artuz,* under *Lovage,* under *Nara,* we have to give effect to the state court determination that the petition was untimely.

Well, that's generally my arguments about uncertainty with respect to statutory tolling.

THE COURT: What about equitable tolling?

MR. DOLGENOS: Well, once again, your Honor, *Fahey* controls. The Court in *Fahey* held that uncertainty in the time bar, even with the relaxed waiver rule that exists in capital cases, or existed in capital cases, uncertainty – that kind of uncertainty in the application of the PCRA time bar was not an extraordinary circumstance justifying tolling, even in capital cases. No. Excuse me. I'm mixing up equitable and statutory tolling.

Uncertainty in the time bar is not an extraordinary circumstance, but in capital cases, the court held that you don't need an extraordinary circumstance, that the balance is [11] different. And as I say, there was a better argument in capital cases arising from the existence of the relaxed waiver doctrine.

And what we have to do with respect to equitable tolling is – is talk about two things in non-capital cases.

Number one, the extraordinary circumstance. Was there an extraordinary circumstance that was preventing the prisoner from filing the habeas petition on time? *Fahey* already ruled that a mere uncertainty in the application, that the PCRA time bar is not an extraordinary circumstance.

B, we have to take into account all of the circumstances to see if the petitioner was diligent, and that means looking at the notice that the petitioner had. Well, what's the notice here? It's the statute.

And again, this brings us back to the core question of when the statute is passed, what are the petitioner's obligations? Can the petitioner just ignore it? I would say that that's not the law, and that doesn't get to the core of equitable tolling.

There might be a possibility that the PCRA time bar wouldn't be applied as written, but that doesn't mean that the petitioner didn't have to protect his rights. The question here is whether the petitioner could just not go to federal court, because, well, I have an argument to make, the PCRA time bar doesn't apply to me.

[12] With respect to the opportunities the petitioner had to file a federal petition, well, when the statute was first enacted, he actually could even have filed another state petition, even though it would have ultimately been held untimely. That is, the statute was enacted by the legislature in November of '95, effective 60 days later. So within that 60-day window, he could have filed a second PCRA petition, which – to which the time bar would not have applied. He didn't do that. He waited ten months to file a PCRA, and when he filed the PCRA, he didn't – he didn't mention the time bar.

And I want to emphasize something here. He's not arguing that he was ignorant of the PCRA time bar. It's – that's not enough for equitable tolling. I mean, that's clear. Just mere ignorance of the law is not enough for equitable tolling.

He's arguing, as I understand it, that he was misled by a vague statute, or that the statute was so vague as written that he couldn't – he can't be expected to have known what to do. So he knew about the time bar, but he didn't mention it when he filed the PCRA petition, which means that he was hoping that it wouldn't get raised, or that the Court wouldn't think of it, or – or I'm not sure what, or the Commonwealth wouldn't raise it.

He ultimately did raise – he ultimately did make [13] time bar arguments, but that was only after – as I remember it, it's only after the Superior Court held that it was untimely. In his re-argument petition, he raised arguments as to why his petition shouldn't have been held to be untimely.

In 1997, while his PCRA was pending, when the Superior Court decided *Alcorn* (ph) and *Conway,* and applied the PCRA time bar, he didn't file a habeas petition then either.

In 1998 and 1999, when the Pennsylvania Court specifically characterized the PCRA time bar as jurisdictional, he didn't file a habeas petition then either.

When the Superior Court ultimately rejected his own PCRA as untimely, he filed a re-argument position. He didn't file a protective habeas petition.

When the Pennsylvania Supreme Court denied allocatur, he still waited five months to file a habeas petition.

Taken together, the mere uncertainty in the law – assuming there's uncertainty, the mere uncertainty in the law does not erase the old standard for equitable tolling. The question here is notice, diligence, the circumstances of

the case. And given – and it's our position that when that statute was passed, when the PCRA statute was passed, he had to take steps to protect his federal rights.

[14] That's essentially the crux of our equitable tolling argument.

In your order, your Honor, you talked about the possible inadequacy of the PCRA time bar and whether or not the inadequacy of it should give rise to equitable tolling as I – and as I understand it, that's also borne of the uncertainty problem, too.

I think just the fact that – well, first of all, I don't believe it's inadequate because of many of the same factors that I've talked about before, that as he had notice that it would be applied, he really – he had an opportunity to raise his claims both before that PCRA time bar was passed and immediately afterward. The statute has been applied by the state courts every single time, so I don't think it's inadequate rule.

But more importantly, for purposes of this case, I think adequacy doesn't immediately get you over the equitable tolling test. I think you have to look not at the law itself. I think you have to look at the petitioner's actions, the petitioner's diligence. That's ultimately the equitable tolling test. And again, for the reasons that I talked about before, here, given the traditional standard of diligence, I don't think you can say the petitioner met it.

There are a couple of other problems that were raised in Mr. Nolas' – or arguments that were raised in Mr. [15] Nolas' response to our motion for reconsideration. I'm not sure if your Honor has any questions of me at this point.

THE COURT: Not yet.

MR. DOLGENOS: Why don't I – maybe I should sit down and let Mr. Nolas give you his views, and if I can briefly respond to them.

THE COURT: Thank you.

MR. DOLGENOS: Thank you very much, your Honor.

MR. NOLAS: Your Honor, good afternoon.

THE COURT: Good afternoon.

MR. NOLAS: The issue – issues before the Court strike me as so clear, that I don't know that a lengthy response is necessary. However, as your Honor knows, sometimes I can't help myself, so if I go on too long, you tell me, please.

THE COURT: I will.

MR. NOLAS: Thank you, your Honor.

Just to put it in context, initially, what is before the Court today is not an initial ruling by your Honor, it's a request for reconsideration and a request to certify the issue for purposes of appeal.

I won't belabor the point, but the Commonwealth's burden in those two contexts, it has been characterized as extraordinary, needing to show that your Honor has been clearly erroneous, needing to show that you fundamentally [16] erred, needing to show that a manifest in justice was worked against the Commonwealth, and that a substantial ground with a likelihood of success is to be raised on appeal with respect to the second issue.

THE COURT: Well, it's suggested that I didn't follow *Fahey* with respect to statutory tolling.

MR. NOLAS: Correct, your Honor. And I would submit to your Honor that if your Honor were to rule in the Commonwealth's favor, given Third Circuit law today, then your Honor would be fundamentally erring. And let me tell you why I say that. *Fahey* is not a case that is to be read in isolation as if it is the only pronouncement on point from the Third Circuit.

I can stand here and talk to your Honor for two hours about *Fahey*, what it means, what went on before the Court, what the ramifications were. As your Honor knows, you presided for some time in *Fahey*, as did Judge Shapiro. But I'm not going to do that because the Third Circuit has construed *Fahey* and the United States Supreme Court's opinion in *Artuz*, since the time that *Fahey* was decided, in a manner that undoes the Commonwealth's argument here today.

Specifically, on the question of properly filed and statutory tolling, your Honor posed the question, does *Fahey* preclude statutory tolling? The answer to that question is no, *Fahey* does not preclude a finding of statutory tolling in [17] Mr. Pace's case. We know that because the Third Circuit told us so in the *Nara v. Frank* case. That's at 264 Fed. 3d, 310.

When you put Mr. *Nara*'s case side by side with Mr. Pace's case, and you look at the language of the Third Circuit in *Nara*, the result that your Honor reached as to Mr. Pace's case being properly filed is not even open to dispute, much less so clearly erroneous.

Specifically, *Nara* had filed a PCRA petition in 1996, the same time period that Mr. Pace filed his PCRA petition. Mr. Nara withdrew his PCRA petition in open court.

In 1996, Mr. *Nara* filed a motion to withdraw his guilty plea in open court. The state trial judge rejected that as untimely, holding that that should have been filed ten days after the conviction, and he did not have authority to entertain a motion to withdraw the guilty plea. The case went up to the Superior Court in *Nara*. The Superior Court affirmed.

When Mr. *Nara* filed his federal habeas petition, one of the issues before the Third Circuit was whether the state court motion that Mr. *Nara* filed, construed as a PCRA petition, was properly filed under the United States Supreme Court's opinion in *Artuz* so that it would toll the federal habeas filing deadline.

The Third Circuit in *Nara* found that it was. It found that the test to be applied in these circumstances is [18] whether – is a flexible approach that the federal court should apply, viewing the petition as – through the lens of whether it was properly filed at the time that it was filed, not as the Commonwealth would have it, at some point down the road.

Or to put it another way, as the Third Circuit said in *Lavage*, a petition that is complying with what appears to be state law at the time, and appears to be properly filed, doesn't lose that characteristic because subsequently the state courts rule that it was procedurally barred or that it was subject to some other procedural reason why it would not be considered.

In the *Nara* case, the Third Circuit held that since the state trial court accepted the motion, looked at it and considered it, the same thing as in Mr. Pace's case, since the state trial court allowed counsel and briefing as to the post conviction petition, the same thing as what happened in Mr. Pace's case. And since the state court ruled on the merits of it, in addition to its bar holding, because the state court had said it would not allow Mr. *Nara* to withdraw his guilty plea, that was sufficient to show that the petition was properly filed for purposes of the federal question that your Honor addresses, is something properly filed so as to be sufficient to allow for statutory tolling.

Now, I know there's some language in *Fahey* that says [19] the opposite, but *Nara* came after *Fahey*. *Fahey* did not discuss *Artuz* from the United States Supreme Court. *Fahey* did not talk about it, consider it, apply it.

In *Nara*, the Third Circuit talked about it, considered and applied *Artuz* and found that given those circumstances, the petition is to be deemed properly filed for purposes of statutory tolling.

In Mr. Pace's case, you have a petition filed at a time period when, on its face, it was proper. The state trial court, the PCRA court, accepted it, read it, appointed counsel, asked for briefing, and ruled only on the merits. The state trial court did not say that the case was subject to the one year state statute of limitations.

So when you put *Fahey* here and you look at what the Third Circuit said subsequently in *Nara*, the dicta in *Fahey* that the Commonwealth has relied on for purposes of its statutory tolling argument, is not the Third Circuit's law any longer. The Third Circuit's law on point is *Nara*.

There was a problem, however, in *Nara*, which was that even with all of that, Mr. Nara had still waited more than a year to get his case to federal court. Therefore, even with the properly filed analysis, the Third Circuit found, since he had waited more than a year to get his case to federal court – if he had not waited more than a year – and Mr. Pace didn't wait more than a year, he came to federal [20] court after the ultimate denial from the state courts – but since Mr. Nara had waited after the state courts had denied relief, he would not receive the benefit of statutory tolling.

The Third Circuit then went on to say that they would turn to equitable tolling. And on the equitable tolling, the way that the Third Circuit phrased the question is that federal courts have discretion to apply the principles of equitable tolling when it would be unfair to not apply them. There's no reliance on the *Fahey* – the one sentence in *Fahey* that the Commonwealth has relied on in making its presentation to your Honor.

Your Honor has already made a finding of fact that it would be inherently unfair to Mr. Pace to apply the federal statute of limitations, given the status of state law at the time that he filed his petition. And the status of state law at the time that he filed his petition is also something not to be looked at in isolation.

In *Lambert v. Blackwell,* 134 Fed. 3d, at 506, the Third Circuit explicitly rejected the Commonwealth's current argument that cases such as *Banks* apply only in the capital setting.

The Third Circuit indicated that in capital and non-capital cases, the Pennsylvania courts were willing to look beyond what may be a procedural bar and entertain the

merits [21] when the petitioner alleged, as Mr. Fahey alleged – as Mr. Pace alleged in state court, that all prior counsel were ineffective, that there was a miscarriage of justice, that the sentence was illegal, all those three classically recognized exceptions to procedural default at the time, in 1996, under Pennsylvania law.

What is also significant to consider is what the Commonwealth itself said in *Lambert* to the Third Circuit. In *Lambert,* in 1998, two years after Mr. Pace had filed his PCRA petition, the Commonwealth explained that Pennsylvania law has recognized a miscarriage of justice exception to waiver doctrine under the pre-amendment PCRA. No Pennsylvania case has refused to recognize this exception to waiver as a result of the new amendments.

The district court made a quantum leap in its interpretation of the 1996 amendments to the PCRA as barring any exception to waiver. There is nothing in the legislative history of the 1996 PCRA amendments to support such a conclusion. Pennsylvania case authority would suggest that there exists a miscarriage of justice exception to the waiver doctrine that would enable the Court to review *Lambert's* claims.

So the Commonwealth's own position in *Lambert* in 1996 was that a PCRA petition could be considered on the merits in federal court for a petitioner exactly in the same [22] posture as Mr. Pace. I won't belabor the point. Several district courts have held so. The Third Circuit indicated so in its first *Banks* opinion. And your Honor also knows from our submission that there were several – several state court decisions that did not apply the one-year statute of limitations to petitioners such as Mr. Pace as of the time

which he filed. And that's the time period we're looking at here.

That being said, what becomes even clearer is that *Fahey* should not be looked at in isolation is something that the Third Circuit addressed directly, most recently, in *Banks.* The recent *Tober* 2001 *Banks* opinion is at 271 Fed. 3d, 527.

In *Banks,* the Third Circuit had a situation similar to Mr. Pace's. *Banks* filed for PCRA relief in the Pennsylvania courts in 1997, one year after Mr. Pace. *Banks* argued in federal court against the position that the Commonwealth is taking here, and took in *Banks,* that statutory tolling applied.

The Third Circuit did not hold in *Banks, Fahey* said X, therefore, *Banks* is not subject to statutory tolling. The Third Circuit explained that although technically *Banks'* petition was found barred by the state courts, however, was the petition necessarily therefore not properly filed? While we could explore this concept under Pennsylvania law and the [23] federal habeas statute citing *Artuz,* not *Fahey,* we need not do so because equitable tolling applies.

And I'll take just a couple more moments and go through the four reasons laid out by the Third Circuit as to why equitable tolling applies, because they're dispositive in Mr. *Fahey's* case.

Number one, the Third Circuit held contrary to the Commonwealth's argument that the state of the Pennsylvania law regarding the nature of the filing requirement was unclear at the time that *Banks* filed. The state of Pennsylvania law in 1996 was as unclear for Mr. Pace as it was for Mr. *Banks* in 1997.

Number two, *Banks* could reasonably have viewed the state time limit as a mere statute of limitations subject to equitable tolling, not as the Pennsylvania courts later held, a jurisdictional requirement.

Similarly, Mr. Pace, who filed in 1996, could reasonably have viewed it – and he did reasonably view it, as we know from his filing – not as a jurisdictional requirement, but as a traditional bar that can be overcome in certain circumstances.

Significantly, just one point as an aside. To construe a statute of limitations as jurisdictional is a very strange bird. None of the circuits do that. The United Supreme Court does not hold statute of limitations to be [24] jurisdictional. There's no other state that I know of that construes a statute of limitations to be jurisdictional.

So the one-year filing limit that Pennsylvania imposed, a reasonable – even a studied, learned person looking at it would say, well, it's not jurisdictional, it's subject to exceptions. We know that because the statute says so, and we know that because statutes of limitations generally are not deemed jurisdictional. The Pennsylvania Supreme Court and the Superior Courts subsequently deemed it that way well after Mr. Pace had already filed his petition and was litigating his case.

Banks held that that second factor, that there was no way to know when *Banks'* petition was filed in 1997, what the state courts would rule after it was filed, that second factor indicates that equitable tolling is appropriate. *Banks* affirmed the district court's holding that viewing that situation, what happened in *Banks*, and as we've laid out in our written submissions, a similar thing that

happened in Pace, viewing it as a ruling that would bar federal review would result in the unfair forfeiture of federal review without notice.

The same thing is true for Mr. Pace. It would be – removing federal review without any notice to him in 1996, any reasonable notice when he filed, that the result would be there would be no federal review.

[25] And the Third Circuit directly held in *Banks*, "This provides a basis for us to call on equitable tolling principles in application of our own federal time parameters, the one-year ETBA (ph) requirement."

As to the issue of equitable tolling, *Banks*, the latest pronouncement from the Third Circuit, is directly on point. *Banks* does not accept the analysis under *Fahey* that the Commonwealth is suggesting that your Honor accept, and a ruling in the – what the Commonwealth is seeking is a ruling that would be contrary to *Banks*, contrary to the latest pronouncement from the Third Circuit Court of Appeals.

Now, let me just take a step back. *Fahey* happened early on in this process. *Nara*, *Banks*, Judge Shapiro's recent ruling in the *Rosato* case that we submitted as a supplemental authority, since the decision in *Fahey*, and in light of *Artuz*, there is more directly applicable case law that squarely addresses the issue before your Honor, namely, *Nara* and *Banks*, and disposes both the statutory and the equitable tolling principle in a way that demonstrates that your Honor's holding was completely correct.

And I will add that there's a fifth factor in this case, a case that did not appear in *Banks*, and that is, as your Honor said, and as reason dictates, if Mr. Pace had filed

with you in 1996, your Honor made a finding that you would have dismissed for lack of exhaustion so that he can [26] complete his state court litigation. That was not a factor relied upon in *Banks*. That's an additional factor in Pace that indicates that it's drastically unfair to not apply equitable tolling principles to Mr. Pace.

The Third Circuit directly held so in *Banks*. It said, "It would be unfair to not toll the statute of limitations during the pendency of that state petition up to the highest state reviewing court."

And in rendering that holding, the *Banks* court – and when you look at it, it becomes crystal clear what the Third Circuit intended – the *Banks* court quotes *Fahey* and doesn't say *Fahey* is a special bird that applies only to capital cases. Doesn't say *Fahey* is a case that forecloses this type of relief for non-capital petitioners.

What the Third Circuit said in *Banks* is that the holding of *Fahey* is when it is unfair to apply statutes of limitations in a way that take away federal review from a person such as Mr. *Banks* or such as Mr. Pace, then equitable tolling applies.

So *Fahey* is not to be read in isolation as if it is the only pronouncement. The more recent pronouncements actually construe *Fahey*, apply *Fahey*, and construe it in a way that is totally consistent with your Honor's order, and, in fact, our precedent on point from the Third Circuit supporting your Honor's ruling.

[27] One other point and then, unless your Honor has questions, I'll stop.

When Mr. Pace – as your Honor indicated in your opinion, when Mr. Pace saw that the statute of limitations

was going to be applied against him by the state courts, something that was not done by the trial court, not done in the original briefing in the Superior Court, he submitted that state prison officials had interfered with his access to documents. That is an exception to statutes of limitations recognized by the Third Circuit in cases such as *Miller*, and recognized by the PCRA statute itself, the new one.

Therefore, Mr. Pace's state court submissions were properly filed, even if you didn't have *Banks*, or *Nara*, or *Fahey*, even if you had simply *Artuz*, simply what the Supreme Court said is the definition of properly filed, and that is, that somebody attempts to comply with state law as it is at the time of filing.

Then the question isn't, did the state courts later say it's procedurally barred, or meritless, or frivolous, or we won't even look at? The question is, was it accepted and was it reviewed? Mr. Pace's petition was sufficient to be accepted and reviewed under the law as it was in 1996, and even under the law as it is today, as the Commonwealth would have it, because he cited that exception.

Therefore, under – no matter how you slice it, the [28] bottom line is that your Honor was not clearly erroneous. You were not fundamentally wrong in your ruling. To the contrary, your ruling is in compliance with Third Circuit law, in compliance with United States Supreme Court law, *Artuz*, and in compliance with several district court decisions. I won't go through them in detail. Your Honor has them in writing.

The bottom line then becomes, in response to both of your Honor's questions, the answers are very straightforward. *Fahey* does not preclude statutory tolling.

And number two, given that your Honor found that state law was unclear at the time that Mr. Pace filed his petition in 1996, the same finding the Third Circuit made in *Banks*, given that there was no adequate and independent straight ground in 1996, the same finding that the Third Circuit made in *Banks*, and given that the state court applied the new bar retroactively, the same finding that the Third Circuit made in *Banks*, equitable tolling applies to Mr. Pace, as does statutory tolling. Equitable tolling, the Third Circuit said so in *Banks; Nara* from the Third Circuit, statutory tolling also applies to Mr. Pace.

Mr. Pace has alleged that his guilty plea resulted from remarkable ineffective assistance of counsel that gave him – a lawyer who gave him materially inaccurate advice as to the plea, rendering it involuntary.

[29] There is Third Circuit case law on point, *Myers v. Gillis*, for example. I won't rattle them off today. It's not the right time for it. But there's Third Circuit case law on point that says that that's not only a colorable claim, but that, if given an opportunity, Mr. Pace can obtain relief under federal law.

Mr. Pace was 17 at the time of the guilty plea. Mr. Pace is serving life without parole, as your Honor noted in your order, the second most serious sentence known to law. Mr. Pace should not have the opportunity to present his case to your Honor, foreclosed on the thin threat that the Commonwealth has provided to your Honor, especially given the Third Circuit's case law since *Fahey* that shows that your Honor was eminently correct.

THE COURT: Would these proceedings be advanced if this matter – if this issue was certified to the Third Circuit?

MR. NOLAS: I can't see how they would be advanced. They would be delayed by the two years that it would take the case to go up and come back down.

First, that advancing the litigation is something that the Commonwealth has to convince your Honor here, but just normally convince any tribunal that there's a substantial likelihood of success in the appeal. There's no substantial likelihood of success in the appeal when the [30] Third Circuit has already decided the statutory tolling issue in *Nara*, and the equitable tolling issue in *Banks* in a way that is consistent with your Honor's order.

Now, we could go up, we could brief it, I'll get up there and argue it, Mr. Dolgenos will get up there and argue it. When your Honor looks at *Banks* and *Nara* and lays them side by side with this case, is there any conceivable way that you can say there is a strong likelihood that the Third Circuit will say, we won't apply this precedent to Mr. Pace? And there's no strong likelihood of that. Does the Commonwealth have an argument? Sure, they have an argument. Is it an argument that is a strong likelihood of success? Not when the Third Circuit on point has ruled in Mr. Pace's favor already.

Secondly, the Commonwealth is not put in a more difficult position. These arguments that they've been presenting to your Honor, they can preserve, they can raise them on appeal after there is a determination from the Court as to the merits of Mr. Pace's claims.

So the Commonwealth is not hurt, and I don't see how it advances the ultimate result to have us go up, when the likelihood is we're just going to come right back down and be where we are today, with us asking for the opportunity to actually present the merits of Mr. Pace's case.

THE COURT: Thank you.

[31] MR. NOLAS: Thank you very much, your Honor.

THE COURT: Mr. Dolgenos.

MR. DOLGENOS: Thank you, your Honor.

Just very briefly. As I understand Mr. Nolas – well, he said two things about *Fahey*. One is that the pronouncements in *Fahey* on which we're relying are dicta. I don't think they're dicta. I think that's just a matter of reading the case. I think it's pretty clear that *Fahey* meant what it said.

The other theory is that *Fahey* was somehow overruled by *Artuz*, by *Nara*. And I think there is no way to read these cases in such a way as to hold that *Fahey* has been overruled.

Let me first talk about *Artuz*. The holding in *Artuz*, this Court specifically said – specifically reiterated the holding that the Third Circuit made in *Fahey*, which is that the properly filed test in the habeas statute of limitations ultimately turns upon the state's procedural requirements for filing a collateral petition, including the timeliness of the petition. That's exactly what *Fahey* says. That's exactly what *Artuz* says. That's exactly what *Lovage* says. That's exactly what *Nara* says.

The only issue that's open – and it's explicitly left open in *Artuz* – is whether or not if there are exceptions to the statute of limitations and the state prisoner attempts to meet those exceptions, that that could [32] transform an improperly filed petition into a properly filed petition. But

Artuz also explains why ultimately that argument should be rejected.

The Court in *Artuz* gave the example of filing a collateral petition with a clerk in state court, and the clerk accepts the petition, and ultimately, the petition is found to be untimely. The Court made it clear that what that does is it shows that the petition was pending, but not properly filed. Ultimately, if the state courts find that it was untimely, it was pending, but not properly filed. And thus, the Court gave meaning to all of the language in the habeas statute, the properly filed test, as well as the pending test. So that question remains open.

THE COURT: But what if a trial judge considers and disposes of the petition on its merits?

MR. DOLGENOS: Do you mean in the alternative or just –

THE COURT: I mean, does that satisfy the properly filed petition standards under *Artuz*?

MR. DOLGENOS: No –

THE COURT: Not a clerk, but the order's been filed with the Prothonotary's Office, and the trial judge considers the petition and acts on it on the merits.

MR. DOLGENOS: No, your Honor, it would not be properly filed if the state court ultimately found that the [33] trial court had not – did not have jurisdiction to act on the petition.

THE COURT: Well, is jurisdictional the same as properly filed?

MR. DOLGENOS: No, it doesn't have to be. But here in Pennsylvania, because the time bar has been found to be jurisdictional, what this Court would have to hold –

THE COURT: Well, what was determined?

MR. DOLGENOS: When – when was –

THE COURT: That was said in 1999.

MR. DOLGENOS: Well, it's my position, of course, that it's clear from the statute that it's jurisdictional, but – and no one ever said it wasn't jurisdictional –

THE COURT: If it were jurisdictional, why did the Supreme Court have to decide if it's jurisdictional?

MR. DOLGENOS: Well, the Supreme Court said it was jurisdictional, but that doesn't mean that there was ever much question in the state courts, it would be found to be jurisdiction.

But putting that aside for a moment, say there was question. In, I believe – I did a little bit of research on this this morning, and I found a case in the Superior Court. I think it was *Perry – Commonwealth v. Perry,* which mentioned that it was – that the PCRA time bar was jurisdictional in 1998. And then you have that spate of [34] cases that the Court is aware of, in 1999, *Peterkin,* et cetera, which held squarely that it was jurisdictional.

If I could just address *Nara* for a second. I disagree with the way Mr. Nolas talked about *Nara. Nara* involved – it was not a PCRA petition at all. *Nara* filed a third PCRA petition, which was timely, by the way. And the Court suggested that he withdraw it and file a motion to withdraw his guilty plea, nunc pro tunc, which he did. And then the Court looked at that and rejected it.

It didn't reject the nunc pro tunc motion as untimely. That's not what you do with nunc pro tunc motions. You just – you address them to find out whether or not they meet the standards for nunc pro tunc motions. And there's no question that the Court had jurisdiction in *Nara* to consider this motion to withdraw the guilty plea nunc pro nunc.

The difference between this case, or a case where there's an untimely PCRA, and *Nara,* is in this case, the Court did not have jurisdiction. That's what the appellate – state appellate court said. The Court did not have jurisdiction to decide this PCRA.

THE COURT: Well, is that what the Pennsylvania Supreme Court said?

MR. DOLGENOS: In this case, no, your Honor, the Superior Court.

THE COURT: What did it say?

[35] MR. DOLGENOS: The Court said that it was untimely. You know, offhand, I don't know if the Court said specifically that it was without jurisdiction. But that's what all the other cases say. It's – in fact, I believe it did, actually, say that the Court was without jurisdiction to entertain it. I'm 90 percent sure.

It's my position that that wouldn't really matter if the Court didn't say that. I mean if the Court says it's untimely – and other courts say untimely means you have no jurisdiction – then that's a jurisdictional finding.

Nara did not overrule *Fahey*. And neither did *Artuz*, which, after all, held that an untimely collateral petition is not properly filed.

With respect to *Banks*, *Banks* was a capital case. It held exactly the same way as *Fahey* found. That is, you have in a capital case, the extra concern of relaxed waiver. In that case, the Court saw that there was – in its view, there was an exaggerated uncertainty, and because of that, they granted equitable tolling. That's pretty much the result that *Fahey* reached. It may be a little bit different in the way it approached the issue, but it didn't overrule *Fahey*.

THE COURT: Well, aren't you concerned about judicial legislation, that there could be a relaxed waiver rule for capital cases and not for life imprisonment? I mean what's the rationale?

[36] MR. DOLGENOS: For relaxed waiver or for not having it in life cases?

THE COURT: Yes.

MR. DOLGENOS: Relaxed waiver is purely a creature of the Pennsylvania Supreme Court. And it was created back in 1982 – I think it's *Zettlemoyer* (ph) – *Commonwealth v. Zettlemoyer*, for the express purpose that limited relaxation of waiver rules is the phrase – for the express purpose of making sure that prisoners who are condemned to death get review of their claims before they're executed. In a life case, the Pennsylvania Supreme Court has never applied relaxed waiver because there is no imminent threat of execution.

THE COURT: There is an imminent threat to the person in prison. But unless there is review, the person will be in prison for the rest of his life.

MR. DOLGENOS: But that's not an act by the – the denial of review is not an act of the state, as it would be if a person is executed before he gets review. If someone misses a deadline, that's not ultimately the responsibility of the state courts, o long as there is the opportunity for review. And remember that Mr. Pace did, in fact, have –

THE COURT: Well, the person's liberty is dead.

MR. DOLGENOS: Well, there's no doubt that Mr. Pace received an extraordinarily serious sentence for an [37] extraordinary brutal beating of a man to death on Market Street. We might disagree about whether or not that's an appropriate sentence, but – and I don't mean to minimize it. I think it would be far more troubling if the federal courts were to engraft a relaxed – essentially, a relaxed waiver provision onto a class of cases that the Pennsylvania Supreme Court has not done so.

THE COURT: Well, so are you citing *Fahey* for the holding – for the proposition that there could be equitable tolling in capital cases and not in non-capital cases, or are you suggesting that this Court should follow state law? Did *Fahey* come up with that, or was it preexisting?

MR. DOLGENOS: *Fahey* said specifically that death is different, and that it would – because death is different, the Court in *Fahey* required less than an extraordinary circumstance to justify equitable tolling.

THE COURT: Am I bound by that conclusion of the Third Circuit –

MR. DOLGENOS: Yes.

THE COURT: – that death is different?

MR. DOLGENOS: Yes, your Honor, I believe you are. I don't mean to say that you couldn't in a life case ever find equitable tolling. But what I'm saying is that you couldn't, for the same reasons that were presented in *Fahey* accept equitable tolling in a live case, when the Court in [38] *Fahey* explicitly said that it's – that that would not meet the standards for equitable tolling in a non-capital case.

THE COURT: And that still remains good after *Artuz*?

MR. DOLGENOS: I believe so, your Honor. I believe so. If I could just –

THE COURT: Isn't *Artuz* a kind of leveling the playing field case? I mean it's – if it's properly filed, as we've defined it, it is properly filed and that's the end of it. Isn't that what *Artuz* says? Let's not get into this discussion about who's more important, the person who's going to die through execution, or the person who's going to die through life imprisonment.

MR. DOLGENOS: I think that it's true that *Artuz* made no distinction between the two, but *Artuz's* holding was that an untimely petition is not properly filed, as well as a petition that is timely but that is rejected on the merits or for procedural reasons specific to each claim, like waiver. That's properly filed. But a timeliness holding, a holding that something is untimely, *Artuz* says, is not properly filed. It's sort of the same thing that *Lovage* held, which is the Third Circuit's case that came out a couple years before. It's the same distinction that *Lovage* made.

If I could just end, your Honor, if you have no further questions for me, with sort of a plea to – if your Honor sees fit to grant statutory or equitable tolling in [39] this case – I think what we have here is an extraordinary situation where we have a large number of petitioners who filed their PCRA petitions between 1996. And as I understand your Honor's question, 1999 would be the operative end date for your analysis or for Mr. Nolas' analysis, because that's when the jurisdictional issue was cleared up. That's three and a half, four years. That's a long time. A lot of petitioners filed their petitions during that time. Up to now, we – the district courts have been holding in lock step that if the state courts ultimately found that the PCRA petition was untimely, then it was not properly filed. And so a lot of these petitions have already been dismissed as untimely.

If Mr. Nolas is right –

THE COURT: How many were dismissed after *Artuz*?

MR. DOLGENOS: I would have to check, your Honor. I believe so. I don't – I'm a little baffled as to how *Artuz* could have changed the rule when *Artuz* says that untimely petitions are not properly filed.

But in any event –

THE COURT: Well –

MR. DOLGENOS: In any event, your Honor, it's an issue that, if Mr. Nolas is right, the Third Circuit has overruled itself with a panel opinion sub silentio. That is, by not mentioning *Fahey*, not saying that *Artuz* overruled [40] *Fahey*, and when we come to work in the morning, and

we're responding to these petitions, we need to have some more certainty.

And I think everyone, including the prisoners, needs to know whether or not an untimely petition is properly filed or not. And so because it's an extraordinarily important issue, and because often an issue like this evades review, because it often happens if we lose on the tolling issue, we'll win on the merits, so often, these don't – these issues don't go up, I think it's important for this one to go up.

THE COURT: Don't you want to win on the merits?

MR. DOLGENOS: I would like to win on the merits. I would not like – I would rather not get to the merits if we don't have to.

THE COURT: Okay.

MR. DOLGENOS: Thank you, your Honor.

THE COURT: Thank you. Mr. Nolas, do you have anything else?

MR. NOLAS: I have some reiteration, your Honor, but I don't know if I want to trouble you with it, so I'll just stop, unless your Honor has questions, of course.

THE COURT: No, I don't have any questions. I will consider your arguments and make a decision.

MR. NOLAS: Thank you, your Honor.

[41] MR. DOLGENOS: Thank you, your Honor.

THE COURT: Thank you all very much.

(Proceeding concluded at 3:09 o'clock p.m.)

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CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Geraldine C. Laws — 10/12/04
Geraldine C. Laws, CET — Date
Laws Transcription Service

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

MEMORANDUM

Giles, C.J. March 29, 2002

I. Introduction

John A. Pace ("Mr. Pace"), a state prisoner who pled guilty to second-degree murder and possession of an instrument of crime, petitions for a writ of *habeas corpus* under 28 U.S.C. § 2254. This court had referred Mr. Pace's petition to United States Magistrate Judge M. Faith Angell for a Report and Recommendation. She recommended that the petition be dismissed as time-barred because the Antiterrorism and Effective Death Penalty Act ("AEDPA") includes a statute of limitations that requires that federal *habeas* petitions be filed within one year of the date that a petitioner's conviction becomes final in state court. *See* 28 U.S.C. §2244(d)(1). The Recommendation accurately noted that petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996, have one year from that date to file their petitions. *See Burns v. Morton,* 134 F.3d 109, 111 (3d Cir 1998). It concluded that a petition ultimately dismissed as time-barred by a Pennsylvania appeals court was not submitted according to the state's procedural requirements, and thus, was not "properly filed" for purposes of tolling the federal *habeas* statute. (Report and

Recommendation at 7.) The Recommendation reasoned that petitioner had only until April 23, 1997 to file his federal *habeas* petition. This § 2254 petition was filed by December 24, 1999 and was, therefore, seen as time-barred.

Petitioner filed objections to the Report and Recommendation claiming that his second state court petition, pursuant to the Pennsylvania Collateral Relief Act ("PCRA"), should have tolled AEDPA's statute of limitations either because his state court petition was "properly filed" or because this court should apply "equitable tolling" pursuant to the third circuit's opinion in *Miller v. New Jersey Dept of Corrs.,* 145 F.3d 616 (3d Cir. 1998). The Commonwealth of Pennsylvania responded, opposing the objections. In *Pace v. Vaughn,* 151 F. Supp.2d 586, 591 (ED. Pa. 2001), this court held that Mr. Pace's state court petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations, and that, even if it had not been "properly filed," petitioner was entitled to equitable tolling while his second state court PCRA petition was pending.

On June 22, 2001, the respondents moved for reconsideration or permission to appeal. Oral argument was heard on January 29, 2002. For the following reasons, the motion for reconsideration is denied and the motion for permission to appeal is granted.

II. Background

A. *State Court Proceedings*

On February 13, 1986, petitioner pled guilty before the Honorable David N. Savitt of the Court of Common Pleas of Philadelphia County to the charges of possession

of an instrument of crime and the second-degree murder of Randolph Baldwin. Petitioner, who was then seventeen years old, was sentenced to life imprisonment without the possibility of parole. Petitioner did not file a motion to withdraw the guilty plea and he did not file a direct appeal.

Six months later on August 21, 1986 petitioner filed a *pro se* petition under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 PA. CONS. STAT. ANN. § 9541, *et seq*. Through appointed counsel, petitioner eventually filed an amended petition claiming both trial court error and ineffective assistance of trial counsel. The Commonwealth moved to dismiss the amended PCHA petition. The PCHA court granted that motion on July 23, 1991. On March 30, 1992, the Superior Court affirmed the PCHA court's decision. The Supreme Court of Pennsylvania denied Allocatur on September 2, 1992.

The PCHA was replaced by the PCRA in 1988. The PCRA was amended in 1995 and those amendments became effective on January 16, 1996. Act of Nov. 17, 1995, P.L. 1118 No. 32 (Spec. Sess. No.1), § 1.

On November 27, 1996, petitioner filed a second *pro se* application for collateral relief under the PCRA. The PCRA court appointed counsel and allowed petitioner to amend his application. Mr. Pace's second application alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) the guilty plea was entered involuntarily; and (3) all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet. at 5-5A.) On July 23, 1997, the PCRA court denied the petition on its merits. Petitioner appealed to the Superior Court of Pennsylvania.

While petitioner's appeal was pending, the Superior Court decided *Commonwealth v. Alcorn*, 703 A.2d 1054, 1057 (Pa. Sup. Ct. Dec. 17, 1997). It held, for the first time, that the 1995 amendments to the PCRA disallowed second or successive petitions filed more than one year after an underlying conviction became final, even if the conviction became final and the first petition was filed before the enactment of the 1996 amendments. *Alcorn*, 703 A.2d at 1056 (finding that "our research has indicated no prior decisions . . . interpreting this section [9545(b)]; therefore, its applicability to this case presents a question of first impression").

The Commonwealth wrote a letter brief to the Superior Court concerning the pending appeal of the denial of Mr. Pace's second PCRA petition. It argued that based on *Alcorn* the petition was time-barred. The Superior Court agreed and, on December 3, 1998, it dismissed the petition as time-barred.

By motion, petitioner requested re-argument, contending there for the first time that prison officials had wrongfully destroyed legal documents, and that that conduct entitled him to an exception to the PCRA's new statute of limitations, pursuant to 42 PA. CONS. STAT. ANN. §9545(b)(1)(i) ("the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim . . . "). (Pet.'s Objs. to Magis. Rep. and Recommendation, Ex B, App. for Re-argument at 3.) On February 8, 1999, without stating reasons, the Superior Court denied the request for re-argument. Petitioner appealed to the Supreme Court of Pennsylvania. Allocatur was denied on July 29, 1999.

B. Federal Proceedings

On December 24, 1999, petitioner filed this federal *habeas* petition, *pro se*. In it, he claimed that 1) neither his state trial court judge nor his attorney properly informed him that his original life sentence expressly precluded the possibility of parole, and 2) his sentence was meted out pursuant to a Pennsylvania statute which was inconsistent with other Pennsylvania statutes, in violation of the Due Process Clause of the United States Constitution. (§ 2254 Pet. at 8.)

As discussed *supra* Magistrate Judge Angell recommended that the § 2254 petition be dismissed as time-barred. This court declined to follow the Report and Recommendation and, in an opinion dated June 7, 2001, found that Mr. Pace's petition was "properly filed" for purposes of tolling the federal *habeas* statute of limitations and that, even if it had not been properly filed, petitioner was entitled to equitable tolling while his second PCRA petition was pending.

Respondents filed a motion for reconsideration on the grounds that this court's holding is directly contrary to *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2000), which, they argue, is binding authority as to both the statutory and equitable tolling issues raised by Mr. Pace. (Resps.' Pet. at 2.) Since the June 7, 2001 order and opinion in *Pace*, there have been relevant circuit case law developments on the issue of whether a state PCRA petition, ultimately declared untimely by the state's highest court, may be "properly filed" for purposes of the federal *habeas* statute. Also, the third circuit has rendered decisions which clarify that court's position on equitable tolling. Nevertheless, while this court denies the respondents' motion for reconsideration, it

grants permission for an immediate appeal because there are important legal questions involved which perhaps should most appropriately be answered by the third circuit at this stage of the proceedings.

III. Discussion

A. Standard for a Motion for Reconsideration and for Interlocutory Appeal

1. Motion for Reconsideration

Reconsideration of a judicial ruling is appropriate if (1) there has been an intervening change in controlling law; (2) there is new evidence not previously available; or (3) there is a need to correct a clear error of law or fact or to prevent a manifest injustice. *Public Interest Research Group of New Jersey Inc. v. Magnesium Elektron Inc.*, 123 F.3d 111, 116-117 (3d Cir. 1997).

2. Interlocutory Appeal

The appropriate standard for an order granting permission for an interlocutory appeal is whether (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

B. Mr. Pace's Second PCRA Petition Statutorily Tolled AEDPA 's Statute of Limitations

1. AEDPA's Statute of Limitations

A state prisoner must file his or her federal *habeas corpus* petition within one year after the completion of the

state court proceedings. 28 U.S.C. § 2244(d)(1). The following section became effective on April 24, 1996, when the Antiterrorism and Effective Death Penalty Act of 1996 was signed into law:

> Title 28 U.S.C. § 2244(d) provides in relevant part:
>
> (d)(1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection. 28 U.S.C. § 2244(d).

AEDPA's statute of limitations is subject to statutory and equitable tolling. *Miller,* 145 F.3d at 618. In addition, the third circuit has held that it would be impermissibly retroactive to "bar the filing of a *habeas* petition before April 23, 1997, where the prisoner's conviction became final before April 24, 1996 . . ." *Burns,* 134 F.3d at 111. Mr. Pace's conviction became final in 1986. He had one year from the enactment of AEDPA, plus any additional time, for which he can show statutory or equitable tolling is appropriate, within which to file a federal *habeas* petition.

2. Pennsylvania's PCRA Statute

When petitioner filed his second PCRA petition on November 27, 1996, the Pennsylvania collateral relief statute had recently been amended. The amendments placed new time limits on PCRA petitions. The relevant part of the amended limitation subsection reads:

> (b) Time for filing petition. –
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively. 42 PA. CONS. STAT. ANN. § 9545.

The 1995 PCRA amendments were accompanied by a Note concerning legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a

timely petition under [42 PA. CONS. STAT. ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Sec. 3(1) of Act 1995 (Spec. Sess. No. 1), Nov. 17, P.L. 1118, No. 32. On its face, § 9545(b) of the PCRA states that a petition must be filed within one year of the date that a petitioner's conviction becomes final, unless the petition falls within one of its enumerated exceptions, or the petitioner's conviction became final before the effective date of the amendments and the petitioner is filing a first application.

3. Pace's Second PCRA Petition was "Properly Filed" Under Federal Law

The Supreme Court held in *Artuz v. Bennett,* that a state *habeas* petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls the federal *habeas* statute

> when its delivery and acceptance are in compliance with the applicable laws and rules governing filing. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee. 531 U.S. 4, 8 (2000) (quoting *Lovasz v. Vaughn,* 134 F.3d 146, 148 (3d Cir. 1998)).

"[T]he question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Artuz* 531 U.S. at 9. *Artuz* distinguishes between state statutes or statutory provisions which set forth "a condition to filing" as opposed to "a condition to obtaining relief." *Id.* at 11.

However, *Artuz* specifically left open the question "whether the existence of certain exceptions to a 'timely' filing requirement in a state collateral relief statute can prevent a late application from being considered 'improperly' filed" for federal *habeas* purposes. *Id.* at 9 n.2. Although the third circuit has not directly answered this question, other circuits which have decided the issue have found that "if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as 'properly filed.'" Such a statute "does not impose an absolute bar to filing" and is a "condition to obtaining relief" rather than a "condition to filing." *Dictado v. Ducharme,* 244 F.3d 724, 728-29 (9th Cir. 2001); *Smith v. Ward,* 209 F.3d 383, 384-85 (5th Cir. 2000) (holding that a petition is "properly filed," even if eventually dismissed as untimely, when the state statute governing timely filings contains certain exceptions which require some level of judicial review); *but see Brooks v. Walls,* No. CIV.A.01-1584, 2002 WL 126606, at *2 (7th Cir. Feb. 2, 2002) (holding that a "plain error exception" to a state statute's timely filing requirement does not prevent a late application from being "improperly" filed for federal *habeas* purposes).[1]

[1] Pennsylvania's PCRA statute differs materially from the Illinois PCRA statute which the seventh circuit treats as a procedural filing requirement even though Illinois state court judges "cast at least a sidelong glance at the merits in order to determine whether to excuse failure to meet the deadline." *Brooks,* 2002 WL 126606, at *1. The Illinois PCRA statute states in relevant part:

> (c) No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave

(Continued on following page)

Current third circuit precedent is entirely consistent with the approach that the ninth and fifth circuits have employed. In *Nara v. Franks*, the third circuit discussed the flexible approach that it has adopted in determining whether a state collateral petition is "properly filed" for purposes of § 2244(d)(2) and statutorily tolls AEDPA. *See Nara v. Frank*, 264 F.3d 310, 315 (3d Cir. 2001). In

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to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 L. COMP. STAT. 5/122-1(c).

The seventh circuit found that the Illinois statute lacks the merits-related exceptions that the [AEDPA] applies to federal courts." *Brooks* 2002 WL 126606, at *3. Instead, an Illinois state court may excuse a late filing if the petition demonstrates "plain error." *Id.* Conversely, the "merits-related" exceptions to the timeliness requirement in Pennsylvania's PCRA statute are virtually identical to those contained in the AEDPA. *Compare* 42 PA. CONS. STAT. ANN. § 9545(b)(1)(i)-(iii) *with* 28 U.S.C. 2244(d)(1)(B)-(D).

The seventh circuit described the approach of Illinois trial judges in evaluating untimely PCRA petitions as follows: "Thus any state prisoner whose delay was not caused by his own 'culpable negligence' (which forecloses any consideration of an untimely filing) receives either plenary review or a judicial response along the lines of 'this petition is late; and because it does not demonstrate a miscarriage of justice, I have decided not to excuse the untimeliness.'" *Brooks*, 2002 WL, 126606, at *1.

Although the seventh circuit has characterized its review as "non-merits based," it is respectfully suggested that as th[illegible] "sidelong glance at the merits" is meant to be meaningful and not a frivolous judicial exercise, it is a "merits-based" review system. The merits are considered, however cursorily, with a deliberate eye trained to determine if the untimeliness of the petition should be excused to avoid a miscarriage of justice in a particular case.

determining that petitioner Nara's state post-conviction petition was properly filed for purposes of federal law, it applied the distinction discussed in *Artuz* between whether a state collateral petition meets the "conditions for filing" as contrasted to an inquiry as to whether the claims in the petition meet all of the "conditions for obtaining relief" under state law. *Id.*[2]

Nara is consistent with its earlier decision in *Lovasz* which held that the question of whether a state court petition is "properly filed" does not depend upon the state court's ultimate ruling on the merits of the application. *Nara*, 264 F.3d at 315 (quoting *Lovasz*, 134 F.3d at 149 (a meritless PCRA petition can still constitute a "properly filed application" under § 2244(d))). *Lovasz* found that if a state allows petitioners to file second or successive petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one year period of limitation of § 2244(d)(1) while a second or successive petition is pending in the state court system. *Lovasz* stated that "[w]hile we recognize that the Pennsylvania Supreme Court has announced strict rules regarding the granting of second and subsequent petitions, Pennsylvania allows for the filing of second or subsequent PCRA petitions, and courts occasionally grant relief in such proceedings.(citations omitted)" *Lovasz*, 134 F.3d at 148-149.

As discussed above, § 9545(b)(1) of the PCRA statute sets forth strict rules or conditions for obtaining relief

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[2] Petitioner Nara had filed a motion to withdraw a guilty plea nunc pro tunc which the third circuit noted is akin to an application for state post-conviction or other collateral review. *Id.* at 316.

under Pennsylvania law. However, this statute is not an absolute bar to filing a second or successive petition more than one year after a conviction became final. The statute contains exceptions that require "some level of judicial review" to examine the merits of the petition before it can be dismissed as time-barred. At the very least, a state court must examine a PCRA petition to determine whether the petition alleges any of the enumerated exceptions to the one year time-limit: (i) that the failure to raise the claim previously was the result of interference by a government official; (ii) that the facts upon which the claim is predicated were unknown to the petitioner, or (iii) that the right asserted is a newly recognized and retroactive constitutional right. 42 PA. CONS. STAT. ANN. § 9545(b)(1).

Therefore, this court sees § 9545(b)(1) of the PCRA statute, as imposing conditions for obtaining relief and not as an absolute bar to filing a petition. *See* ***Rosado v. Vaughn*, No. CIV.A.00-5808, 2001 WL 1667575, at *3 (E.D. Pa. Dec. 28, 2001) (finding that § 9545(b) "discourages late PCRA petitions by strictly limiting the availability of relief, but, given its exceptions, it does not impose an absolute bar to filing a late application: it is not a procedural filing requirement."); *Cooper v. Vaughn*, No. CIV.A.00-6016, 2001 WL 1382492, at *3 (E.D. Pa. Nov. 6, 2001) (same).** Mr. Pace's second PCRA petition was untimely under Pennsylvania law in that it was too late for him to obtain relief under Pennsylvania law, yet, the PCRA petition was "properly filed" for purposes of federal law and tolled AEDPA's statute of limitations since it complied with the relevant factors set forth in *Lovasz*. 134 F.3d at 148.

4. Fahy Does Not Preclude a Finding That Pace's Second PCRA Petition Was Properly Filed

Respondents argue that *Fahy* controls the issue and requires a finding that Mr. Pace's second PCRA petition was not "properly filed." (Resp.'s Mot. at 2.) However, in a decision after *Fahy*, the third circuit specifically declined to reach the issue of whether a second PCRA petition, clearly untimely under Pennsylvania law, was necessarily not "properly filed" under § 2244(d)(2) for federal purposes. *See Banks v. Horn*, 271 F.3d 527, 534 (3d Cir. 2001) [*Banks IV*][3]. The third circuit stated:

> [w]hile we could explore this concept [whether an untimely state petition is necessarily not properly filed] under the applicable Pennsylvania law and under the federal *habeas* case law, *Artuz*, we need not do so, because we conclude that, even were we to decide that the late filing of Banks's second PCRA rendered it not 'properly filed,' the District Court appropriately called on equitable principles to toll the one-year AEDPA requirement given this unusual fact pattern.(citations omitted) *Id.*

Fahy does not control an issue which the third circuit recognized had not been decided as of October 31, 2001, the date of the *Banks IV* decision.

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[3] There are numerous relevant and important opinions in the various *Banks* proceedings. While we designate the opinions for purposes of this opinion, they are not consistent with how other courts have numbered the various decisions. *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997) [*Banks I*]; *Banks v. Horn*, 63 F. Supp.2d 525 (M.D. Pa. 1999) [*Banks II*]; *Commonwealth v. Banks*, 726 A.2d 374 (Pa. 1999) [*Banks III*]; *Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001) [*Banks IV*].

Respondents further contend that *Fahy* stands for the proposition that an untimely PCRA petition cannot be "properly filed" under federal law. (Resps.' Mot. at 10.) Actually what *Fahy* holds is that a federal court, in determining whether a state PCRA petition was "properly filed," must interpret state law as it does when sitting in a diversity case and must defer to a state's highest court when it rules on an issue. 240 F.3d at 243-244. The *Fahy* panel observed that the Pennsylvania Supreme Court had specifically ruled that *Fahy's* petition *was not properly filed as a matter of state law* and that that determination by the highest state court was binding on a federal court. *Id.*

For factual and legal reasons, *Fahy* does not apply to the matter at hand. Factually, this case is materially different from *Fahy*. Here, there has not been a similar determination by Pennsylvania's highest court that Mr. Pace's second PCRA petition was improperly filed as a matter of state law. Here, the PCRA court did not dismiss Mr. Pace's second PCRA petition as time-barred when it was filed on November 27, 1996. Here, the PCRA court appointed counsel to represent Mr. Pace, gave appointed counsel an opportunity to amend the petition, and on July 23, 1997, denied the petition *on its merits*. Petitioner timely appealed to the Superior Court. While the appeal was pending, the Commonwealth sent a letter brief to the Superior Court arguing that Mr. Pace's petition should be dismissed as time-barred, based on *Alcorn*. In seeking reconsideration of the court's rejection of his petition as time-barred, petitioner made a new factual claim that squarely came within one of the exceptions to the PCRA's new statute of limitations. The Superior Court denied

petitioner's request for re-argument *without stating reasons.*

The court acknowledges the argument that Mr. Pace waived his right to raise the governmental interference exception to the PCRA statute of limitations raised to the superior court because he did not make that allegation initially when he filed his second PCRA petition. 42 PA. CONS. STAT. ANN. § 9544(b) (Resp. to Petitioner's Objs. to R & R at 5.). However, given that the Pennsylvania Supreme Court had previously allowed merits review of technically defaulted claims, *see Commonwealth v. Lawson*, 549 A.2d 107, 111-112 (Pa. 1988), Mr. Pace had a good faith basis in believing that that court would review this technically waived issue, which had fundamental constitutional dimensions.

It is noticed that while *Fahy* was filed (Feb. 9, 2001) after the Supreme Court's decision in *Artuz*, (Nov. 7, 2000), the third circuit did not cite to that decision or attempt to reconcile it to the facts and circumstances of *Fahy*. Notably, subsequently, *Nara*, the most recent third circuit opinion on the issue of statutory tolling (Aug. 30, 2001), did cite and follow *Artuz*. Therefore, as a matter of precedent, *Nara*, not *Fahy*, controls disposition of this case.

Further, the *Fahy* panel relied on a ninth circuit case, *Dictado v. Ducharme*, 189 F.3d 889 (9th Cir. 1999) [*Dictado I*] which was subsequently reversed by *Dictado v. Ducharme*, 244 F.3d 724 (9th Cir. 2001) [*Dictado II*]. The ninth circuit reversed to make *Dictado I* consistent with *Artuz*. The third circuit had cited the *Dictado I* opinion for its language: "Had Congress intended to toll the statute of limitations for the period during which even improper

applications were pending in state court, it would not have included the 'properly filed' limitation." *Fahy,* 240 F.3d at 243 (quoting *Dictado I,* 189 F.3d 889, 892 (9th Cir. 1999)). This is the very language that the ninth circuit decided to disavow in light of *Artuz*. *Dictado I* was withdrawn after *Artuz* distinguished between state statutes which are "conditions to filing" as opposed to state statutes which are "conditions to obtaining relief," and left open the question whether the existence of certain exceptions to a timely filing requirement can prevent a late state post collateral petition from being considered "improperly filed." *Dictado II,* 244 F.3d 724, 727 (2001) (quoting *Artuz,* 531 U.S. at 9 n.2). That is precisely the question now at issue in this case.

In *Dictado II,* the ninth circuit held that 'if a state's rule governing the timely commencement of state post conviction relief petitions contains exceptions that require a state court to examine the merits of a petition before it is dismissed, the petition, even if untimely, should be regarded as "properly filed." *Id.* at 727-28. Had the third circuit panel relied on *Dictado II,* an opinion consistent with *Artuz* the panel might have reached a conclusion consistent with *Dictado II.*

C. *Pace's Second PCRA Petition Equitably Tolled AEDPA's Statute of Limitations*

1. *Standard For Equitable Tolling*

The one year "period of limitation" under 28 U.S.C. § 2244(d)(1) to file a federal *habeas corpus* petition is a statute of limitations subject to equitable tolling. See *Miller,* 145 F.3d at 618. The *Miller* opinion explained that

the one year federal *habeas* statute of limitations can be equitably tolled

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient."

Id. at 618.

The *Fahy* panel enumerated three circumstances which permit equitable tolling: "(1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." *Fahy,* 240 F.3d at 244 (quoting *Jones v. Morton,* 195 F.3d 153, 159 (3d Cir. 1999)).

2. *Mr. Pace Has Been Prevented From Asserting His Federal Rights in an Extraordinary Way*

The recent third circuit decision, *Banks IV,* is instructive for determining whether Mr. Pace has in some extraordinary way been prevented from asserting his rights. *See Banks IV,* 271 F.3d at 534. There, the court approved the district court's reasons for equitably tolling the federal statute of limitations: (1) "the state of Pennsylvania law regarding the nature of the filing requirement [42 PA. CONS. STAT. ANN. § 9545(b)] was unclear, and Banks could reasonably have viewed the state limit as a mere statute of limitations subject to equitable tolling, not, as the Pennsylvania Supreme Court, later

held . . . , a jurisdictional requirement" and (2) viewing the Pennsylvania Supreme Court ruling as a bar to filing a federal *habeas* petition "would result in unfair forfeiture [of petitioner's federal rights] without notice." *Id.* at 534. The court found that these factors provide "a basis for us to call on equitable principles in application of our own federal time parameters – the one year AEDPA requirement." *Id.* These fairness factors are replicated here.

a. The Uncertain Nature of the PCRA Filing Requirement

i. Statutory Language and Legislative Note

When Mr. Pace filed his PCRA petition in November 1996, it was not known how Pennsylvania courts would interpret the amendments to the PCRA statute that had become effective on January 16, 1996 and had placed a new one year time-limit on PCRA petitions. From the language of the statute itself, it is not clear that the time-limit is jurisdictional.

The *Banks II* district court decision held that while § 9545 is captioned "[j]urisdiction and proceedings," it is not clear from the statute that all of the subsections involve jurisdiction[4] or that subsection (b), stating the one year time-limit and the exceptions to it, was intended to be jurisdictional in nature. *See Banks v. Horn,* 63 F. Supp.2d

[4] Subsection (a) states that original jurisdiction is in the Court of Common Pleas. Section (c) limits the jurisdiction of the state courts to issue a stay of execution. Section (d) states standards governing admissibility of evidence, discovery, and privilege during and relating to an evidentiary hearing. 42 PA. CONS. STAT. ANN. § 9545. Discovery and privilege are normally not considered jurisdictional matters. *Banks II,* 63 F.Supp.2d at 533.

525, 532-33 (M.D. Pa. 1999) [*Banks II*]. The limitations subsection (b) states that a petition "shall be filed within one year of the date the judgment becomes final . . . " with certain exceptions. The subsection does not use "standard jurisdictional language" that "no court will have the authority to entertain an untimely petition." *Id.* at 534. The district court in *Banks II* concluded that "it cannot be said that § 9545(b) is necessarily jurisdictional in nature, as opposed to a statute of limitations subject to equitable tolling." *Id.* This court, like the third circuit in *Banks IV,* 271 F.3d at 534, finds the reasoning of the district court in *Banks II* persuasive and determinative.

Since Mr. Pace's conviction occurred prior to the enactment of the PCRA amendments, it also could not have been clear how, if at all, the amendments would apply to his second PCRA petition which was filed in November, 1996. The 1995 PCRA amendments had been accompanied by a Note regarding legislative intent. The Note stated that "a petitioner whose judgment has become final on or before the effective date of this act shall be deemed to have filed a timely petition under [42 PA. CONS. STAT. ANN. § 9545(b)] if the petitioner's first petition is filed within one year of the effective date of the act." Section 3(1) of Act 1995 (Spec. Sess. No. 1), Nov., 17, P.L. 1118, No. 32. The Note did not clarify whether petitioners with pre-1996 final convictions, who filed second or successive petitions, but who were filing their first petition since the amendments, had one year after its enactment within which to file a collateral relief petition.

ii. Relaxed Waiver Practice of Pennsylvania State Courts

Although Mr. Pace's case is not a death penalty case, the general practice of Pennsylvania's state courts to provide merits review to technically defaulted claims in death penalty cases ("the relaxed waiver doctrine") increased the uncertainty of the PCRA one year time-limit during the period when Mr. Pace had to decide whether to file for collateral relief in state or federal court. State courts allowed merits review for claims barred by the statutory time-limit of the amended PCRA for capital, *and in some instances non-capital cases,* if the claims alleged (1) the failure to raise the claim earlier was caused by ineffective assistance of counsel, or (2) the failure to address the merits of the claim could result in a miscarriage of justice. ***See Commonwealth v. Albrecht,* 720 A.2d 693, 700 (Pa. 1998) (a PCRA petitioner's waiver will only be excused upon a demonstration of ineffectiveness of counsel in waiving the issue and only in a capital case); *but see Commonwealth v. Beasley,* 678 A.2d 773, 777 (Pa. 1996) (stating that generally a second or successive post-conviction request for relief will not be entertained unless a strong prima facie showing is offered to demonstrate that a miscarriage of justice may have occurred but this showing is not required in a capital case). *Beasley* was decided on June 18, 1996, five months after the PCRA time-bar went into effect.**

The third circuit itself has determined that it was not clear until *Commonwealth v. Banks,* 726 A.2d 374, 375-76 (Pa. Mar. 2, 1999) [*Banks III*] that the state PCRA statute of limitations was jurisdictional and not waivable, and

that Pennsylvania state courts would discontinue the long held practice of allowing merits review for claims barred by the PCRA time-bar. *See Fahy* 240 F.3d at 245. Further, the third circuit has found that the uncertainty in the application of the relaxed waiver rule extended beyond capital cases. The third circuit stated that as of January 16, 1998, it was not clear that Pennsylvania's courts would bar merits review of a PCRA petition in a non-capital case even if that petition were untimely under the PCRA's statutory time-bar and did not meet any of the enumerated exceptions. *See Lambert v. Blackwell,* 134 F.3d 506, 521 & n.26 (3d Cu. 1998) (" . . . Pennsylvania courts have expressed a willingness to depart from the PCRA's stringent waiver standards, for non-capital, as well as capital cases . . ."). In 1997 the third circuit stated that "it is, of course, possible in death penalty cases (and other cases as well) that future experience will show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA and thereby creates a procedural bar sufficient to satisfy the standard of *Johnson v. Mississipi.* That time, however, has not yet been reached." *Banks v. Horn,* 126 F.3d 206, 214 n.3 (3d Cir. 1997) [*Banks I*].

b. Treating Mr. Pace's Second PCRA Petition As Untimely And a Bar to Filing a Federal Habeas Petition Would Result in Unfair Forfeiture Without Notice

It was not until the Pennsylvania Supreme Court decided *Banks III* in 1999 that it was sufficiently clear for federal review purposes that § 9545(b)(1) was jurisdictional and could operate as a bar to federal *habeas* review. *Fahy,* 240 F.3d at 245; *Banks IV,* 271 F.3d at 534. In *Banks*

IV, the court noted that viewing the Pennsylvania Supreme Court's 1999 decision as a jurisdictional bar to a petitioner filing a pre-1999 federal *habeas* petition "would result in unfair forfeiture without notice." *Banks IV*, 271 F.3d at 534. Similarly, barring Mr. Pace from filing his pre-1999 federal *habeas* petition would result in forfeiture of his federal rights without notice. Mr. Pace could not, for federal *habeas* purposes, be said to have had knowledge that the PCRA time-limit was jurisdictional on April 23, 1997, the date that he would have had to file in federal court to protect his federal rights.

Pace's second PCRA petition, filed on November 27, 1996, alleged that: (1) the imposition of a life sentence without eligibility for parole was illegal; (2) his guilty plea was **entered involuntarily; and (3) that all counsel were ineffective, resulting in a denial of due process. (§ 2254 Pet at 8.) Mr.** Pace's second PCRA petition alleged claims that traditionally had overcome the PCRA statutory time-bar. On July 23, 1997, the PCRA court denied Mr. Pace's petition on the merits, giving him no notice that his petition was jurisdictionally time-barred. Although the Superior Court dismissed the second PCRA petition as time-barred, Mr. Pace still had no absolute notice that that ruling meant the time-limit was jurisdictional and not waivable due to the nature of the claims that he raised to that court. When on March 2, 1999 Pennsylvania made it clear that the PCRA time-limit was jurisdictional, Mr. Pace had a motion pending before the Pennsylvania Supreme Court requesting Allocatur from the denial for the motion for re-argument by the Superior Court, discussed *supra*. That motion for re-argument had invoked one of the statutory exceptions to the PCRA time-bar, that is, "the failure to raise the claim previously was

the result of interference by government officials with the presentation of the claim . . ." 42 PA. CONS. STAT. ANN. § 9545(b)(i). Mr. Pace, therefore, had no timely notice, while his second PCRA petition was in the state court system, that his failure to file a *habeas* petition in federal court would deny him his right to federal review.

3. Mr. Pace Exercised Reasonable Diligence in Bringing His Claims

a. Pace Would Not Have Been Allowed to File His Petition in Federal Court At The Time Respondents Contend He Would Have Had To In Order To Protect His Federal Rights

Mr. Pace would not have been allowed to proceed on a petition in federal court within the one year AEDPA statute of limitations because the federal courts in this district would have refused to hear his federal claims because he had failed to exhaust his remedies in state court. Mr. Pace filed his second PCRA petition in November 1996. As of September 1997, the third circuit stated that it was still not clear how Pennsylvania courts would interpret amendments to the PCRA and that federal courts should not hear petitions that were not brought in state court simply because they were thought to be excluded by the 1995 amendments to the PCRA. *See Banks I*, 126 F.3d at 211-14; *see also* ***Hammock v. Vaughn*, No. CIV.A.96-3463, 1998 WL 163194, at *6 (E.D. Pa. April 7, 1998) ("There is thus a lack of certainty with respect to state application of [the 1995 PCRA amendments]. This lack of certainty requires dismissal of the petition."); *Peterson v. Brennan*, No. CIV.A.97-2477, 1998 WL 470139, at *6 (E.D. Pa. Aug. 11, 1998) (same).** Only recently have the state courts interpreted the 1995

amendments to the PCRA conclusively enough that federal courts do not have to dismiss federal *habeas* petitions for failure to exhaust state remedies. ***See Lines v Larkins*, 208 F.3d 153, 164 (3d Cir. 2000) ("It is now clear that the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed."); *Holman v. Gillis*, 58 F.Supp. 587, 594-96 (July 21, 1999) (finding that the ambiguity relating to whether the one year statute of limitations is a procedural bar to all untimely PCRA petitions that do not qualify for the enumerated exceptions was only remedied in December 1998).**

The third circuit stated in *Fahy:*

> When the state law is unclear regarding the operation of a procedural filing requirement, the petitioner filed in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of the state petition up to the highest reviewing court." 240 F.3d at 245.

It was objectively reasonable for Mr. Pace to believe that if he filed a § 2254 petition at the time he filed his second PCRA petition, the federal petition would have been dismissed without prejudice as unexhausted. There has been no abuse of process by Mr. Pace and he has diligently and reasonably asserted his claims. *See Fahy,* 240 F.3d at 244.

This court equitably tolls AEDPA's statute of limitations while petitioner's second PCRA petition was pending from November 27, 1996 until July 29, 1999, because Mr. Pace meets the relevant factors discussed in *Miller, Jones*

Fahy, and *Banks IV.* In an "extraordinary way," the confluence of the following factors caused the petitioner to be prevented from asserting his federal rights: (1) the uncertainty of Pennsylvania law at the time that Mr. Pace had to choose whether to file a state or federal *habeas* petition; (2) lack of notice of forfeiture to Mr. Pace of his right to federal review of his conviction and sentence; (3) the fact that Mr. Pace would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) Mr. Pace has diligently and reasonably asserted his claims; and (5) Mr. Pace's sentence is life without the possibility of parole.

4. Fahy Does Not Preclude a Finding that Petitioner's Second PCRA Petition Equitably Tolled the AEDPA Statute of Limitations

Fahy held that equitable tolling was appropriate in a capital case even where extraordinary circumstances were not established. 240 F.3d at 245. Respondents argue that *Fahy* stands for the proposition that uncertainty in Pennsylvania law cannot constitute extraordinary circumstances. (Resps.' Mot. at 18.) Extraordinary circumstances exist in this case, not based solely on the uncertainty of Pennsylvania law, but also on the unusual confluence of factors that left Mr. Pace, who is serving life in prison without the possibility of parole, without notice of the forfeiture of his federal rights.

Petitioner's sentence, life without the possibility of parole, was imposed when he was only seventeen years old. In applying equitable tolling in a capital case, the third circuit stated, "[i]n a capital case such as this, the consequences of error are terminal, and we therefore pay

particular attention to whether principles of 'equity would make rigid application of a limitation period unfair.'" *Fahy v. Horn,* 240 F.3d at 245 (citing *Miller,* 145 F.3d at 618). The *Fahy* court went on to state, "[w]e elect to exercise leniency under the facts of this capital case where there is no evidence of abuse of process." *Fahy,* 240 F.3d at 245. Mr. Pace's case calls for leniency too because the consequences facing him, the certainty of spending the rest of his life in prison, are extremely grave.[5] Should the court not toll AEDPA's statute of limitations, petitioner will have to spend the rest of his life in prison without being allowed federal review to correct what could be serious deprivations of federally protected constitutional rights. Accordingly, this court finds AEDPA's one year statute of limitations was equitably tolled while petitioner's second PCRA petition was pending.

IV. Conclusion

This court finds that petitioner was entitled to statutory tolling and equitable tolling while his second PCRA petition was pending. Because petitioner's conviction became final before the enactment of AEDPA, he had one year from April 24, 1996, plus the period in which the statute statutorily or equitably tolled, to file his federal *habeas* petition. *See Burns,* 134 F.3d at 111.

[5] The Supreme Court has recognized the special gravity of life without the possibility of parole, noting that the sentence "is far more severe" than a life sentence and that only "capital punishment . . . exceeds it." *Solem v. Helm,* 463 U.S. 277, 297 (1983).

The federal statute of limitations ran from April 24, 1996 to November 26, 1996 (the day before petitioner filed his second PCRA petition) and from July 30, 1999 (the day after the Pennsylvania Supreme Court declined to review the Pennsylvania Superior Court denial of his PCRA petition) until late December, 1999 when petitioner filed his federal *habeas* petition. Given the one year statute of limitations, petitioner had until December 24, 1999 to file his federal *habeas* petition. Petitioner dated his federal *habeas* petition December 22, 1999. The Clerk of Court marked petitioner's *habeas* petition as filed on December 27, 1999. The prison mailbox rule states that the petition is deemed filed when a prisoner gives his petition to prison officials. *See Burns,* 134 F.3d at 113. Since the Commonwealth does not argue otherwise, this court assumes petitioner gave his petition to prison officials by December 24, 1999 making his federal *habeas* petition timely filed.

For the reasons discussed above, the motion for reconsideration is denied. This opinion reaches the same conclusions on statutory and equitable tolling as previously stated in the June 7, 2001 opinion. However, it supersedes the previous opinion to reflect the Supreme Court's decision in *Artuz* and other relevant cases subsequently decided.

The respondents' motion for permission for immediate appeal is granted on the following issues since they involve controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal from this opinion and order may materially advance the earliest efficient resolution of the litigation. The questions of law are

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b)(1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?

2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

The court stays review of the substantive merits pending outcome of the appeal.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN A. PACE,	:	CIVIL ACTION
Petitioner,	:	99-6568
	:	
v.	:	
	:	
DONALD VAUGHN, et al.,	:	
Respondent	:	

ORDER

AND NOW, this ___ day of March 2002, upon consideration of Respondents' Motion for Reconsideration, or in the Alternative for Permission to Appeal, Docket # 20, and the responses thereto, it is hereby ORDERED that Respondent's Motion, **is DENIED in part and GRANTED in part. The motion for reconsideration is denied and the motion for an immediate appeal is granted.**

The court certifies that this order involves controlling questions of law on which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

In finding petitioner's federal *habeas* petition was timely filed, this Court decided two questions of controlling law:

1. Do the enumerated exceptions to Pennsylvania's PCRA statute of limitations, 42 PA. CONS. STAT. ANN. § 9545(b) (1), prevent a late state post collateral petition from being necessarily "improperly filed" for purposes of 28 U.S.C. §2244(d)(2)?

2. Does the confluence of the following factors constitute "extraordinary circumstances" for purposes of equitably tolling AEDPA's one year statute of limitations: (1) the uncertainty of Pennsylvania law at the time that petitioner had to choose whether to file a state or federal *habeas* petition; (2) the lack of notice of forfeiture to petitioner of his right to federal review of his conviction and sentence; (3) the fact that petitioner would not have been allowed to proceed in federal court at the time he would have been required to file his federal *habeas* petition in order to preserve his federal rights; (4) and petitioner's sentence is life without the possibility of parole?

Answers to these questions will determine whether consideration of the substantive issues raised in the petition is appropriate.

Proceedings are stayed in the district court pending the action by the court of appeals on this certification.

BY THE COURT:

JAMES T. GILES C.J.

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THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 99-cv-06568)
District Judge: The Honorable James T. Giles

Submitted Under Third Circuit LAR 34.1(a)
July 7, 2003

BEFORE: NYGAARD, SMITH, and GREENBERG, *Circuit Judges.*

(Filed July 30, 2003)

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

In this case, the Commonwealth of Pennsylvania argues that the District Court erred by both statutorily and equitably tolling the statute of limitations for the federal habeas corpus petition of appellee John Pace under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(2), during the period of time Pace was pursuing post conviction relief in state court under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §§ 9541-9546 (1998) (PCRA). At issue is whether Pace's application for state post-conviction relief was "properly filed" under 28 U.S.C. § 2244(d)(2). We hold that our recent case, *Merritt v. Blaine*, 326 F.3d 157 (3d Cir. 2003), controls the analysis here, and because we find that the application was not properly filed and that equitable tolling was not justified, we will reverse the District Court.

I.

The one-year limitation of the AEDPA is statutorily tolled for the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Pace's petition was statutorily tolled only if his petition for state post-conviction review was both pending and "properly filed." *Merritt*, 326 F.3d at 162. In *Merritt*, which was decided after Judge Giles issued his opinion, we analyzed our decision in *Fahy v. Horn*, 240 F.3d 239 (3d Cir. 2001):

> We held in *Fahy* that an untimely PCRA petition does not toll the statute of limitations for a federal habeas corpus petition. . . . In *Fahy*, we noted that when applying AEDPA, 'we must look to state law governing when a petition for collateral relief is properly filed' and 'defer to a state's highest court when it rules on an issue.' Consequently, just as in *Fahy*, we must defer to the state court's holding that Merritt's PCRA petition was untimely and it follows that it was not 'properly filed' under AEDPA.

Id. at 165-66 (citations omitted). Because the highest state court had held that Merritt's PCRA petition was untimely, it was not "properly filed" under AEDPA.

We do not see any material distinctions between our treatment of Merritt's *pro se* second PCRA petition and Pace's. We are therefore bound by the state court's finding that Pace's second PCRA petition was untimely, and we must reverse the District Court's order holding that Pace's second PCRA petition was tolled by the statute.

II.

The general requirements for equitable tolling are that (1) the petitioner has established that he has been prevented from asserting his rights "in some extraordinary way," and (2) the petitioner has demonstrated that he "exercised reasonable diligence in investigating and bringing [the] claims." *Id.* at 168 (citations omitted).

The Commonwealth contends that, contrary to the determination of the District Court, the lack of certainty as to how Pennsylvania courts would interpret the PCRA is not an "extraordinary" circumstance. We agree. In *Merritt* we explained:

> We recognized that in 1997, when Fahy's PCRA petition was filed, the newly established PCRA

> time limit was 'unclear' and 'inhibitively opaque.' Indeed, we stated that based on that uncertainty, Fahy 'reasonably believed that the state petition was properly filed.' However . . . in *Fahy* we 'did not hold that this lack of clarity in Pennsylvania law constituted extraordinary circumstances.' In fact, we stated that 'in non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling.' Instead of finding extraordinary circumstances, we based our decision to apply equitable tolling in *Fahy* on the accepted principle that 'death is different.' . . . This case is similar to *Fahy*. . . . [I]t was not unreasonable (indeed it was appropriate) for Merritt to have believed he was required to exhaust his state remedies by filing a second PCRA petition prior to filing a habeas petition in federal court. . . . Although Merritt faces the grave penalty of mandatory life sentence without the possibility of parole, we cannot apply the rationale of *Fahy* to Merritt's situation without violating our tradition of avoiding intracircuit conflict of precedent.

Merritt, 326 F.3d at 169-70 (citations omitted). *Merritt* established that the uncertain PCRA time limit is not an "extraordinary" circumstance in the case of mandatory life sentence without the possibility of parole. In addition, the *Merritt* panel held that because Merritt did not act promptly after the decisions of the Pennsylvania Superior Court in 1997,[1] at which point "Pennsylvania law as to the time bar of the PCRA became clear," there was no basis to

[1] *See Commonwealth v. Alcorn*, 703 A.2d 1054 (Pa. Super. Ct. 1997); *Commonwealth v. Conway*, 706 A.2d 1243 (Pa. Super. Ct. 1997).

find Merritt's habeas petition timely under the doctrine of equitable estoppel. This case is on all fours with *Merritt*. We therefore conclude that there are no extraordinary circumstances that would allow for equitable tolling.

III.

In conclusion, we hold that there is no basis to find Pace's habeas petition timely, either under the statute or under the doctrine of equitable estoppel. Indeed, Pace himself concedes that "*Merritt* is materially indistinguishable from *Pace* and, thus, *Merritt's* denial of both statutory and equitable tolling would apply here." Appellee's Supp. Br. Re: *Merritt*, at 1. Based on the foregoing, we will reverse the District Court, and dismiss Pace's petition for habeas corpus as time-barred under the AEDPA.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3049

JOHN A. PACE

v.

DONALD VAUGHN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellants

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(Dist. Ct. No. 99-cv-06568)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, *Chief Judge*,
SLOVITER, NYGAARD, ALITO, ROTH, MCKEE,
BARRY, AMBRO, FUENTES, SMITH,
CHERTOFF, and GREENBERG, *Circuit Judges*[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to

[1] Judge Greenberg's vote is limited to panel rehearing only.

all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATE: Oct. 6, 2003